COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kokopenace, 2013 ONCA 389
DATE: 20130614
DOCKET: C49961/C48160

Goudge, LaForme and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Clifford Kokopenace (C49961)

Appellant

and

Clare Spiers (C48160)

Appellant

and

Nishnawbe Aski Nation
Bushie Family and Pierre Family
David Asper Centre for Constitutional Rights

Interveners

Jessica Orkin, Paul Burstein and Delmar Doucette, for Clifford Kokopenace

Jessica Orkin and Anthony Moustacalis, for Clare Spiers

Michal Fairburn, Scott Latimer, Gillian Roberts and Deborah Calderwood, for the respondent

Jonathan Rudin and Christa Big Canoe, for the Bushie and Pierre families

Cheryl Milne and Kent Roach, for the David Asper Centre for Constitutional Rights

Julian N. Falconer and Sunil S. Mathai, for the Nishnawbe Aski Nation

Heard: April 30, May 2-4, 2012

On appeal from the conviction entered on June 17, 2008 by Justice Erwin W. Stach of the Superior Court of Justice, sitting with a jury, and the convictions entered on December 3, 2007 by Justice James Robert MacKinnon of the Superior Court of Justice, sitting with a jury.

H.S. LaForme J.A.:

INTRODUCTION

[1] The appellant Kokopenace was convicted of manslaughter on June 17, 2008, in the Superior Court in Kenora. The appellant Spiers was convicted of first-degree murder and two counts of kidnapping on December 3, 2007, in the Superior Court in Barrie.

[2] In this court, they each assert that the petit jury that found them guilty was derived from a jury roll that, because of the process used to prepare it, inadequately ensured representative inclusion of Aboriginal on-reserve residents. They argue that this violated their rights under ss. 11(d), 11(f) and 15 of the *Canadian Charter of Rights and Freedoms*, and the *Juries Act*, R.S.O. 1990, c.

J.3 (the Act). Their petit juries were, therefore, improperly constituted. As a result they are entitled to new trials.

[3] In addition to this jury composition issue, the appellants each raised other issues in this court. This panel previously dismissed the other issues raised by the appellant Kokopenace: see *R. v. Kokopenace*, 2011 ONCA 536, 107 O.R. (3d) 189. However for reasons previously released that dealt with the jury vetting in his case, this panel allowed the Spiers appeal and ordered a new trial: see *R. v. Spiers*, 2012 ONCA 798, 113 O.R. (3d) 1. It is therefore unnecessary to address the jury composition issue in that case. The reasons that follow therefore address the jury composition issue in the Kokopenace appeal only.

BACKGROUND

[4] The jury selection process in Ontario takes place in three stages. The first stage is the preparation of the jury roll of individuals selected from the community who are able to serve as jurors. The second stage is the selection of names from the jury roll to make up the jury panels for particular court sittings. The third stage is the selection from the jury panel of the petit jury for a particular criminal jury trial.[1]

[1] Coroners' juries are also selected from the annual jury roll.

[5] The *Criminal Code* governs the third stage of this process, but looks to provincial legislation to govern the first two stages. In Ontario, the Act is that legislation.

[6] The appellant's challenge is to the first stage, namely the preparation of the jury roll. The Act provides that a jury roll will be prepared each year for each county and district in Ontario by provincial officials. The Act requires that, before September 15 each year, the sheriff of the county determines the aggregate number of persons required for the jury roll in the ensuing year, and the number of notices for jury service required to be sent out to achieve that number. It is accepted in this appeal that the county or district constitutes "the community" from which the jury roll will be drawn.

[7] Pursuant to s. 6(2) of the Act, the Director of Assessment for the Municipal Property Assessment Corporation then identifies those to receive the notices by randomly selecting them from the names listed on the most recent municipal enumeration, provided they are residents of the county or district, Canadian citizens and at least 18 years of age. The Director is also required to ensure that each municipality's share of those to receive notices approximately reflects that municipality's share of those in the county or district eligible to receive notices.

[8] However, because the municipal enumeration process does not capture those who reside on Indian reserves,[2] the Act provides a separate process for including them at this step of the jury roll process. The Act permits the sheriff to use any available list of on-reserve residents from which to randomly select the names to receive jury service notices. Section 6(8), which refers to these reserves as "Indian reserves", reads as follows:

> In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available.

[9] Section 6(5) of the Act requires that every person to whom a jury service notice is mailed, whether on or off reserve, complete it and return it to the sheriff. Section 8(1) mandates the sheriff to prepare the jury roll from those persons returning the notices who are eligible for jury service. Section 18(1) directs the sheriff to use random selection from the jury roll to create each jury panel, from which petit juries are then drawn.

[10] The context for this appeal is the preparation of the 2008 jury roll for the District of Kenora. It was the jury roll from which the petit jury that tried this

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[2] Section 2 of the *Indian Act*, R.S.C. 1985, c. I-5, defines "reserve" as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band." Unless otherwise specified in these reasons, "reserve" and "First Nation" will mean the same thing and refer to "reserves" as defined in s. 2 of the *Indian Act*.

appellant was derived. The 2008 jury roll consisted of 699 potential jurors of whom 29 were on-reserve residents.[3] This represents 4.1% of the jury roll.

[11] In geographic terms, the District of Kenora is Ontario's largest. It makes up about one-third of Ontario's land mass. The judicial center is the city of Kenora, where the Superior Court of Justice sits, and where this appellant was tried. There are a large number of Indian reserves in the District, many of them remote from the city of Kenora and many accessible only by air. According to the 2006 census, the total population of the District was approximately 65,000. The on-reserve population is roughly one third of that total.[4] Since it is not contested that the vast majority of persons residing on reserve are Aboriginal,[5] in this appeal I propose to treat Aboriginal on-reserve residents as a proxy for on-reserve residents, and vice versa. A failure of representative inclusion of one is a failure of representative inclusion of the other.

[12] The particular focus of this appeal is on what was done by Ontario to include Aboriginal on-reserve residents in preparing the jury roll. While they were not excluded from the jury roll, the question is whether Ontario did enough to

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[3] This figure, prepared by counsel for the appellant, does not appear to be disputed by the respondent.
[4] Estimates prepared by counsel for the appellant, which the respondent does not appear to dispute, range from 30.2% to 36.8%.
[5] Section 2 of the *Indian Act* defines an "Indian" as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". Unless otherwise specified in these reasons, "Indian" and "Aboriginal" will mean the same thing and refer to "Indians" as defined in s. 2 of the *Indian Act*.

include them in order to meet the representativeness requirement created by ss. 11(d) and (f) of the *Charter*.

[13] Prior to his conviction, the appellant did not seek to challenge the representativeness of the jury roll from which his petit jury was derived. However, he sought to raise the matter on appeal. In light of this court's decision in *Pierre v. McRae, Coroner*, 2011 ONCA 187, 104 O.R. (3d) 321, Crown counsel agreed that it was not in the interest of justice to oppose the representativeness question being raised first on appeal. As a consequence, extensive fresh evidence was filed in this court and this question, broken down into several issues, was fully argued on appeal. Three parties were permitted to intervene, all of whom supported the appellants.

THE LEGAL ISSUES

[14] The major legal issue in this appeal requires the determination of the scope of the appellant's constitutional right under ss. 11(d) and (f) of the *Charter* to representativeness of the jury roll in his case. I will then turn to an assessment of whether, on the facts, the state, namely Ontario, violated that right.

[15] The appellant provides one articulation of the constitutional right and the Crown provides another. They then each apply that articulation to what was done in preparing the jury roll in question, and reach opposite conclusions.

[16] As a corollary, the appellant also says that he accepts the constitutionality of the Act provided it is interpreted to reflect *Charter* values. Given this interpretation of the Act, he argues Ontario's actions that breach the *Charter* also breach its statutory obligations. He does not argue that if those actions are *Charter*-compliant, they nonetheless violate the Act.

[17] While the interveners generally support the appellant, the two who speak to this issue, the Nishnawbe Aski Nation (NAN)[6] and the Bushie and Pierre families, each offer their own articulation of the representativeness right.

[18] For its part the Crown defends Ontario's actions as constitutional, but makes clear it does not rely, in the alternative, on section 1 of the *Charter*.

[19] The second issue raised by the appellant is that, in any event, what the state did in preparing the jury roll constitutes partiality, fraud or wilful misconduct under s. 629(1) of the *Criminal Code*.

[20] Thirdly, the appellant argues that the state's actions in failing to sufficiently include Aboriginal on-reserve residents in the jury roll in his case violates s. 15 of the *Charter*. He is supported in this by the intervener, the David Asper Centre for Constitutional Rights.

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[6] NAN is a First Nations political territorial organization representing the political, social and economic interests of its communities to all levels of government. NAN territory encompasses James Bay Treaty 9 territory and Ontario's portion of Treaty 5. NAN represents 49 First Nations Reserve communities throughout Ontario. Of the 46 Reserves located in the judicial district of Kenora, NAN represents 30. It should be noted that NAN does not keep band lists for its constituent First Nations communities.

[21] Finally, if Ontario did not meet its constitutional obligation, the question of remedy must be addressed.

[22] I propose to deal with each of these issues in turn.

The Representativeness Issue: ss. 11(d) and (f) of the *Charter*

THE LAW

[23] Before assessing the facts to determine whether the constitutional right to representativeness of the appellant was violated, the scope of that right and therefore the scope of the corresponding state obligation must be determined.

[24] The provisions engaged by this issue are ss. 11(d) and (f) of the *Charter*. They read as follows:

> 11. Any person charged with an offence has the right
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> …
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
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> …
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> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

[25] In *R. v. Sherratt*, [1991] 1 S.C.R. 509, L'Heureux-Dubé J. explained that the representativeness right was an essential component of the s. 11(f) right to trial by jury. She said this at 525:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. *Provincial legislation guarantees representativeness, at least in the initial array. The random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries*. [Emphasis added.]

[26] In my view, the representativeness right is also sourced in the s. 11(d) right to a hearing by an impartial tribunal. Where the tribunal includes a jury, deriving that jury from a representative jury roll is an important means of ensuring its impartiality. See *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.) at 118, leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 683.

[27] The representativeness right guaranteed by these two subsections of the *Charter* must inform the entire process of jury selection. Only if the process begins with a properly representative jury roll, can the petit jury randomly derived from it have the required element of representativeness as described in *Sherratt*.

In this appeal, it is the appellant's right to a representative jury roll, what that means, and whether it was achieved that is at stake.

[28] The *Charter* right to a representative jury roll serves several important objectives. First, it is a means of ensuring that any petit jury derived from that jury roll is an impartial decision maker. The representative character it brings to the jury composition process allows the jury to act "as the conscience of the community", as L'Heureux-Dubé J. said in *Sherratt* at 523. Second, it serves to build public knowledge of and trust in the criminal justice system. These objectives of impartiality and enhanced public confidence were described by Rosenberg J.A. in *Scientology*, at 119 this way:

> The justification for the representative nature of the jury is not simply to assure that the case is tried by an impartial tribunal. The representative character of the jury also furthers important societal or community interests by instilling confidence in the criminal justice system and acting as a check against oppression. The accused and the community have an interest in maintaining the representative character of the jury system. In *Sherratt*, L'Heureux-Dubé J. made several other comments concerning the nature of the representative character of the jury. Thus, she stated at p. 524 S.C.R. that the modern jury was not meant to be a tool of either the Crown or the defence but rather "was envisioned as a representative cross-section of society, honestly and fairly chosen".

[29] The central legal issue in this appeal, however, is not the *Charter* roots of the representativeness right nor the objectives it serves, but rather the content of the right. On this question, *Scientology* is the seminal case.

[30] Rosenberg J.A. describes the content of the right in these terms at 120-121:

> The right to a representative jury roll is not absolute in the sense that the accused is entitled to a roll representative of all of the many groups that make up Canadian society. This level of representativeness would be impossible to obtain. There are a number of practical barriers inherent in the selection process that make complete representativeness impossible. The roll is selected from a discrete geographical district which itself may or may not be representative of the broader Canadian society.
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> Further, the critical characteristic of impartiality in the petit jury is ensured, in part, by the fact that the roll and the panel are produced through a random selection process. To require the sheriff to assemble a fully representative roll or panel would run counter to the random selection process. The sheriff would need to add potential jurors to the roll or panel based upon perceived characteristics required for representativeness. The selection process would become much more intrusive since the sheriff in order to carry out the task of selecting a representative roll would require information from potential jurors as to their race, religion, country of origin and other characteristics considered essential to achieve representativeness. The point of this is not to demonstrate that a jury panel or roll cannot or should not be representative, but that the right to a representative panel or roll is an inherently qualified one. There cannot be an absolute right to a representative panel or roll.
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> *What is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict, and contributes to the community's support for the criminal justice system*. [Emphasis added.]

[31] The right to a representative jury roll is thus not an absolute right, but an inherently qualified one. The right does however require the state to use a jury roll process that provides a platform for the selection of a petit jury that serves the objectives of impartiality and enhancing public confidence in the criminal justice system. Essential to achieving these objectives is that the distinctive perspectives that make up the community are provided a fair opportunity to be included in the jury roll, and to be brought to the jury function. In this way the jury can serve as the conscience of the community as the representativeness guarantee requires.

[32] The appellant proposes a three-part test to answer that question. First, a group alleged to be excluded from the jury roll, or underrepresented on it, must be distinctive in a sense that reflects the purposes of the guarantee. Second, the representation of the group on the jury roll must be shown not to be fair and reasonable compared to the group's representation in the community served by the jury roll. Third, this underrepresentation must be due to or exacerbated by factors for which the process used by the state properly bears responsibility.

[33] The interveners phrase their proposed test slightly differently. NAN submits that the state fails in its obligation if the process it uses to create the jury roll results in systematic exclusion or under-inclusion of Aboriginal on-reserve residents, regardless of whether the state can be said to be responsible for it.

The Bushie and Pierre families agree with that, save only that the state may be able to show that it has made all available efforts to cure the deficiencies.

[34] The common theme that these parties share is that the representativeness right seeks a jury roll that mirrors the make-up of the full community from which it is drawn.

[35] The Crown, on the other hand, proposes a quite different answer. It submits that the state's obligation arises only at the first step of preparing the jury roll, namely compiling band lists of Aboriginal on-reserve residents. It must simply make reasonable efforts to access and use broad-based lists of potential jurors from across the community as the source of the names selected at random to receive jury service notices.

[36] In my view none of these tests hit the mark.

[37] The way this court dealt with the facts in *Scientology* sheds light on this aspect of representativeness.

[38] The jury composition issue in *Scientology* was whether the statutory exclusion of non-citizens from the jury selection process violated the representativeness obligation of the state.

[39] This court found that it did not. Non-citizens do not share a sufficiently distinctive set of perspectives to require their inclusion in the process of creating the jury roll. Rosenberg J.A. put it this way at 121-122:

> In my view, there is no characteristic that persons bring to the fact-finding process of the jury based solely on their immigration status. Canadian citizens are of all races, nationalities, ethnic origin, colour, religion, sex, age and ability. Immigration status is simply not a relevant characteristic when regard is had to the rationale underlying the right to a representative pool. A jury pool selected from Canadian citizens represents the larger community for the purposes of trial by jury.
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> . . .
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> I hesitate to attempt to articulate an all-inclusive test of distinctiveness such as "some immutable characteristic". In my view, it is preferable to deal with each case having regard to the purposes of the representativeness requirement as set out by L'Heureux-Dubé J. in *Sherratt*. *The essential quality that the representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons*. The representativeness requirement seeks to avoid the risk that persons with these different perspectives, and who are otherwise available, will be systematically excluded from the jury roll.
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> Exclusion of non-citizens does not infringe the representativeness or fair cross-section requirement in this sense. There was no evidence that non-citizens as a group share any common thread or basic similarity in attitude, ideas or experience that would not be brought to the jury process by citizens. [Emphasis added.]

[40] In this case, there can be no doubt about the importance of the Aboriginal on-reserve perspectives. Aboriginal on-reserve residents constitute a significant portion of the population in the Kenora District, and although all Aboriginal on-reserve residents would not necessarily approach their task in the same way, their race, their shared heritage and their on-reserve life experiences bring

important and distinctive perspectives to their jury service. As *Scientology* tells us, to be *Charter*-compliant, the state's process for preparing the jury roll must bring to the petit jury function the possibility of the inclusion of these distinctive perspectives.

[41] This is made even more essential by the statutory scheme chosen by Ontario. It uses the most recent municipal enumeration for all but Aboriginal on-reserve residents in preparing the jury roll. Because of this exclusion, the statutory scheme provides s. 6(8) to include Aboriginal on-reserve residents in the process of preparing the jury roll. Absent this provision, a process of jury roll preparation using only the most recent municipal enumeration would exclude the distinctive perspectives of Aboriginal on-reserve residents and would therefore not be *Charter*-compliant. Section 6(8) provides a way to avoid such an exclusion.

[42] However here the question is not exclusion but whether Ontario has breached its constitutional obligation by insufficiently including Aboriginal on-reserve residents in the jury roll process. Has Ontario done enough under s. 6(8) to provide Aboriginal on-reserve residents with a fair opportunity to have their perspectives included that it can be said to have met its representativeness obligation?

[43] *Scientology* demonstrates why the approach of the appellant and the interveners is erroneous. It tells us that the answer cannot be dictated by the make-up of the jury roll that results from the process. The right to a representative jury roll is an inherently qualified one. It does not require a jury roll in which each group is represented in numbers equivalent to its proportion of the population of the community as a whole. As Rosenberg J.A. said, there are practical barriers that render this impossible to achieve and the attempt to do so would require undesirably invasive inquiries of potential jurors. Moreover, a fully representative jury roll cannot be squared with the random selection process used to choose those who are to receive jury service notices.

[44] In my view, therefore, in creating the jury roll, the test for the state's compliance with the representativeness right cannot simply look to the composition of the jury roll that results. Hence I disagree with the test proposed by the appellants, NAN and the Bushie and Pierre families, all of which focus on the make-up of the jury roll that results from the state's process, and the extent to which it mirrors the community it serves.

[45] Rather, the focus must be on the steps taken by the state to seek to prepare a jury roll that provides a platform for the selection of a competent and impartial petit jury that will ensure confidence in the jury's verdict and contribute to the community's support for the criminal justice system.

[46] It is useful at this point to recall that the process of preparing the jury roll requires three steps: first, the compilation of the lists and the random selection of names from them to receive jury service notices; second, the delivery, receipt, and return of those notices; third, the entering on the jury roll of those responding who are eligible for jury service. This process applies for all Ontario residents whether off or on reserve.

[47] It must be noted that the state does not have exclusive control over these steps. For example, there may be practical impediments that stand in the way of the state being able to use lists that fully reflect the entire community, or there may be individuals who choose not to respond to the notices received, entirely apart from any action of the state. However, the state's actions clearly matter for both these steps of the process. The state has an important role in compiling the lists and sending the jury service notices and in facilitating delivery and receipt of the notices and the responses to them.

[48] Hence, I disagree with the Crown's proposed test. I do not think that the state's obligation is confined simply to the compilation of the lists from which recipients of the jury service notices are to be selected.

[49] In my view, to meet its representativeness obligation, the state must make reasonable efforts at each step of creating the jury roll. That includes the state's actions in compiling the lists, but also in sending the notices, facilitating their

delivery and receipt and encouraging the responses to them. The objective of the state's actions must be to seek to provide the platform necessary to select an impartial petit jury and to maintain public confidence in the criminal justice system by providing groups that bring distinctive perspectives to the jury process with their fair opportunity to be included in the jury roll.

[50] In summary the question posed is whether in the process of compiling the jury roll, Ontario made reasonable efforts to seek to provide a fair opportunity for the distinctive perspectives of Aboriginal on-reserve residents to be included, having regard to all the circumstances and keeping in mind the objective served by the representativeness requirement.

[51] The reasonable efforts standard is a continuing one. If, as time passes, further steps that are reasonably available are needed to provide the fair opportunity to be included, they must be taken.

APPLICATION OF THE LAW TO THIS CASE

PROCEDURAL HISTORY

[52] Mr. Kokopenace's trial for second-degree murder occurred before Mr. Justice Stach, sitting with a jury, in Kenora in 2008. On June 17, the jury acquitted him of the murder charge, but found him guilty of the lesser and included offence of manslaughter.

[53] Prior to sentencing, Mr. Kokopenace's trial counsel learned for the first time of irregularities in the composition of the Kenora jury roll, particularly with respect to representativeness, when he became aware of an affidavit sworn a few days before by the Acting Supervisor of Court Operations for Kenora District, Ms. Rolanda Peacock ("Peacock Affidavit"). The affidavit had been filed by Coroner's counsel at an inquest into the death of two First Nations persons from Kashechewan, and appeared to demonstrate that the prescriptions of the *Juries Act* in respect of Aboriginal on-reserve residents had not been complied with.

[54] At a pre-sentence conference in late September, Stach J. declined to adjourn the sentencing proceedings to hear a mistrial application as he considered himself to be *functus officio*. Defence counsel determined, therefore, that this court was the proper forum for determining the jury composition issue.

[55] The Crown originally resisted making disclosure in respect of the jury composition issue, taking the position that, pursuant to this court's decision in *R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96, jury composition could not be raised for the first time on appeal, and that the necessary records were both irrelevant and in the possession of the third-party Court Services Division ("CSD"). At the direction of Rouleau J.A., the appeal was bifurcated, permitting the non-jury grounds, a *Roach* application, and a disclosure application to be heard first. Before this hearing could take place, this court released its decision in *Pierre v. McRae*.

[56] In light of this court's decision in that case, which highlighted significant problems with the preparation of the Kenora jury roll, the Crown agreed that it was not in the interest of justice to oppose the question of the representativeness of the jury being raised on appeal. Disclosure for the purpose of the appeal of the jury composition issue soon followed, and extensive fresh evidence was filed in this court. The non-jury appeal grounds were argued first and later dismissed; however, no order was issued and this court adjourned the appeal in order to hear argument on the jury composition issue. See *R. v. Kokopenace* at paras. 4-6 and 64.

[57] The jury composition question, broken down into several issues, was fully argued on appeal. Three parties were permitted to intervene, all of whom supported the appellant.

[58] Finally, on February 26, 2013, while this appeal was under reserve, the Honourable Frank Iacobucci, a retired justice of the Supreme Court of Canada, released his independent report on the representation of First Nations persons on Ontario juries ("Iacobucci Report"). In 2011, Mr. Iacobucci was appointed by the province of Ontario "to review the process for including persons living on reserve communities on the jury roll and to do so independently of government and on a systemic basis": see *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: February 2013), Appendix A, at 95. By letter dated February

27, 2013, all parties supported tendering this report for consideration by this court as fresh evidence. I would accept the Iacobucci Report as fresh evidence and I will consider it in my analysis.

THE COMPILATION OF THE JURY ROLL AND ABORIGINAL ON-RESERVE RESIDENTS

[59] As described above, the jury selection process in Ontario takes place in three stages and the appellant's challenge is to the first stage, the preparation of the jury roll.

[60] Although the Act refers to the duties of the "sheriff", in practise it is the local court staff in each county or judicial district that are responsible for facilitating the process of sending out jury notices. They determine the number of jury service notices to be sent out for the following year, based on anticipated jury demands and other factors. Then, employees at the Provincial Jury Centre ("PJC") inform the Municipal Property Assessment Corporation ("MPAC") how many off-reserve jury notices are required to be sent out for each district, and ask MPAC to randomly select names from municipal enumeration lists.

[61] For Aboriginal on-reserve residents, local court staff – instead of the MPAC and the PJC – facilitate this stage of the process. They advise the PJC of the number of questionnaires needed and receive that number of questionnnaires from the PJC. They obtain the names of on-reserve residents, randomly select who will receive jury service notices, and prepare and mail the notices.

[62] At the time relevant to this appeal, completed jury service notices in respect of the MPAC process were returned to the then-Ministry of Revenue; completed questionnaires in respect of the s. 6(8) process were returned directly to the PJC. Then, the names of eligible prospective jurors were entered into the jury selection system, which is used to develop the jury roll for each county or district, and for selecting panels for each Superior Court of Justice location, as required. Eligibility is determined pursuant to criteria set out in the Act. Once added to the roll, a potential Aboriginal on-reserve resident juror is no more or less likely to become a member of a jury panel than any other potential juror.

[63] Until 2000, Indian and Northern Affairs Canada ("INAC")[7] provided lists to provincial authorities for the purposes of s. 6(8) of the Act, which included the names of persons affiliated with each band[8]. At the time relevant to this appeal, local court staff understood the practice to be that if a band electoral list could not be directly obtained from reserves in the judicial district, the INAC band lists could be used.

[64] The problems that are the focus of this appeal, regarding the preparation of the jury roll, became evident primarily because in 2001 INAC stopped providing

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[7] This department of government is now called Aboriginal Affairs and Northern Development Canada. Because most of the materials filed in this matter refer to INAC, that is the designation that will be used throughout these reasons.

[8] Section 2 of the *Indian Act* defines a "band" as "a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951", and a "band list" as "a list of persons that is maintained under s. 8 by a band or in the Department." Section 8 states, "There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band".

CSD with band lists for the purposes of preparing jury rolls going forward, ostensibly as a result of privacy concerns. At the heart of the appeal, then, are the state's efforts to address any problems that may have arisen or come to light after the loss of the INAC band lists, which had an impact on the right to a representative jury under s. 11 of the *Charter*.

COMPOSITION OF THE JURY ROLL IN KENORA AND THE PEACOCK AFFIDAVIT

[65] As mentioned above, the context for this appeal is the preparation of the 2008 jury roll for the judicial district of Kenora. Ontario Court of Justice ("OCJ") sittings occur at base courts in Kenora and Dryden, and at satellite courts in Sioux Lookout and Red Lake. In addition, court staff from the District service 26 fly-in or drive-to OCJ locations within the District. All Superior Court jury trials in the District take place in Kenora, with the exception of indictments in criminal matters originating from some reserves in the north-east region which are almost invariably transferred to the Superior Court of Justice in Cochrane for trial.

[66] The reserve and Indian settlement lands within the Kenora District are associated with 46 First Nations. Many of the First Nations communities in the District are accessible only by air. According to the 2006 census, the total population of the District was approximately 65,000. As already noted, the on-reserve population is about one third of that total.

[67] In 1993, the return rate for completed questionnaires was approximately 33% for Aboriginal on-reserve residents as compared to 60% to 70% for non-Aboriginal communities: see *R. v. A.F.* (1994), 30 C.R. (4th) 333 at para. 53 (Ont. C.J. (Gen. Div.)) In 2002, 9 years later, the Aboriginal on-reserve return rate declined to 15.8%. By 2008 – the year that is being examined in this appeal – that rate, as we shall see later, had declined to 10%.

[68] In the Iacobucci Report, several factors are identified as possible reasons for the reluctance of Aboriginal on-reserve residents to participate in the jury selection process. These include conflicting views regarding the traditional approaches to conflict resolution; systemic discrimination experienced by First Nations people within the justice system; a lack of knowledge about the justice system generally and of the jury system in particular; the desire, expressed by First Nations leaders, to assume greater control of justice matters in their communities; and concerns for the protection of privacy rights with respect to the disclosure of personal information. In addition, concerns were expressed with respect to the content of the jury questionnaire itself, particularly the statement of penalty for non-response, the requirement to declare citizenship and the language requirement: see the Iacobucci Report at 4-5.

[69] Importantly however, the report also concluded (at 63) that:

> [A]t present, the manner in which potential First Nations jurors are identified is ad hoc and contingent upon the

> efforts made by court staff to connect with First Nations, and ultimately the decisions of First Nations to exercise their discretion to disclose a list of reserve residents. This ad hoc system has proven to be ineffective and results in a jury roll that is unrepresentative of all First Nations peoples on reserve.

[70] This being said, during the period that response rates by on-reserve residents were less than ideal, a significant substantive change occurred in the system used by Kenora court services: in 2001, Ontario ceased to have access to the prevalent data source – the INAC band lists – on the basis of which jury service notices were delivered to on-reserve residents.

[71] Concerns with respect to the preparation of the Kenora jury roll after 2000 first came to light for those outside Ontario court services operations in 2008, with the filing in court of the Peacock Affidavit, detailing jury preparation efforts in Kenora. As I have stated above, the affidavit was sworn in connection with a coroner's inquest into deaths on the Kashechewan First Nation.

[72] In summary, the Peacock Affidavit disclosed that because INAC was no longer supplying up-to-date band lists for the region, court officials tried to obtain lists directly from First Nations reserves within the District. The affidavit summarized efforts made by court services officials in 2006 and 2007 in this regard, as well as the results that those efforts produced: of the 45 First Nations in the judicial district, 4 responded to the 2006 efforts by producing lists and 8 responded to the 2007 efforts.

[73] In addition, the Peacock Affidavit represented that in 2007, the Kenora jury roll was based on jury service notices sent to 1,200 persons living in municipalities and 484 Aboriginal on-reserve residents. The eligible rate of return was 66% in 2006 and 56% in 2007 for the former, and the eligible rate of return was 10.72% in 2006 and 7.83% in 2007 for the latter. Of a population of more than 12,000 Aboriginal on-reserve residents in Kenora, only 44 were included on the 2007 jury roll, and not a single person from Kashechewan (where the deaths took place) was included on the jury roll.

PIERRE v. MCRAE

[74] In late 2007, two young Aboriginal men died in Thunder Bay. Inquests into their deaths were ordered under the *Coroners Act*, R.S.O. 1990, c. C.37. Weeks before the inquest began, the families of the deceased raised concerns regarding the representativeness of the jury roll in the District of Thunder Bay. They sought confirmation that First Nations individuals living on reserves were included on the jury roll.

[75] Neither the coroner nor the Ministry of the Attorney General (“MAG”) appeared willing to answer their concerns. A request was therefore made to the coroner to issue a summons to a representative of MAG – in this case, the Director of Court Operations for the North West Region – to attend at the inquest before the jury was sworn, to give evidence on how the jury roll was composed. This request was refused.

[76] A judicial review of the refusal was denied by the Divisional Court: see *Pierre v. McRae* (2009), 259 O.A.C. 1. In January 2010, leave to appeal to this court was granted. The record for the appeal included the Peacock Affidavit.

[77] In allowing the appeal in respect of the Thunder Bay jury roll in *Pierre*, Laskin J.A., at paras. 68 and 69, relied heavily on the Peacock Affidavit's insight into the Kenora jury roll preparation and observed that:

> Ms. Peacock's affidavit shows that court officials did very little to obtain other records and, as a result, the District of Kenora jury roll was manifestly unrepresentative….
>
> Ms. Peacock's affidavit shows that much more needed to be done to produce a representative jury roll in the District of Kenora. The annual roll in the years after INAC stopped sending band electoral lists to the Provincial Jury Centre almost entirely excluded First Nations persons living on reserves.

[78] The appellant does not seek to rely on *Pierre* as dispositive of any issue in this appeal. I agree with this approach. In *Pierre*, this court examined the representativeness of the Kenora jury roll only to see whether there was a basis for inquiring into the representativeness of the Thunder Bay jury roll, which was the issue in that case. Moreover, the Peacock Affidavit was a two-page summary of efforts in respect of the 2007 Kenora jury roll. In this appeal, by contrast, the fresh evidence going to the representativeness of the 2008 Kenora jury roll – in particular, the details of the state's efforts to compensate for the loss of the INAC band lists – is voluminous, encompassing many thousands of pages. The Crown

submits that when this fresh evidence is considered, this court's findings in *Pierre* will be distinguishable and that the efforts by the state to create the jury roll for 2008 will be found to pass constitutional scrutiny.

[79] To that end, I propose next to set out the efforts that were made by the state to produce a representative jury roll in the District of Kenora between 2000 and 2008. The onus of proof is on the appellant to demonstrate the *Charter* breach by showing that the state's actions in this regard fell short of its obligations: see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supplemented, vol. 2, looseleaf (Toronto: Thomson Reuters Canada, 2007) at para. 38.4.

[80] In the circumstances of this case, two facts gave rise to the potential constitutional problem and must, therefore, ground the analysis – the change in Federal policy that caused the provision of band lists to cease, and the continuing decrease in the rates of return of jury service notices by Aboriginal on-reserve residents.

[81] The efforts taken after INAC stopped providing the lists, and up to the preparation of the 2008 jury roll for Kenora, in respect of the s. 6(8) process have to be understood as a response to this state of affairs; the appropriateness or not of the state's efforts will be wholly informed by these circumstances and by Ontario's response to them. It is not enough, in the particular circumstances of

this appeal, to focus solely on the efforts made in 2007 for the preparation of the 2008 jury roll. The analysis is an iterative one. That is, it will include an examination of the state's efforts in the year 2000 and each following year in order to assess the appropriateness of its response to the constitutional issue.

[82] For that reason, in order to determine whether the state's efforts in respect of the preparation of the 2008 jury roll for Kenora survive a constitutional challenge, some of the prior history of s. 6(8) work in the district has to be reviewed as part of the necessary context.

THE STATE'S KNOWLEDGE OF DECREASING RETURNS

[83] Before 2007, the PJC did not advise Kenora District court staff of the response rates for jury questionnaires sent to Aboriginal on-reserve residents.

[84] The process and information that appears to have been followed by MAG dates back to at least the mid-1990s. Each year the Kenora District office determined the number of questionnaires to be sent to Aboriginal on-reserve residents and forwarded this on to the PJC. The PJC in turn sent the Kenora District the equivalent number of questionnaires and prepaid postage return envelopes addressed to the PJC. The questionnaires, therefore, were returned directly to the PJC for vetting as to eligibility and inclusion on the jury roll. Through this process, the PJC knew the number of returns as compared to the number of questionnaires sent out.

[85] Also, a Minister's cover letter, drafted by the PJC in English and French, was sent out along with the questionnaire throughout Ontario. Further, in Kenora District an additional letter was also included that was specifically drafted to help reserve residents understand the jury process. This letter was included in plain English and in Ojibway and Oji-Cree syllabics. The opening paragraph of the English version of this letter reads:

> We are trying *to involve more First Nation members* in jury duty so we can have the benefit of their wisdom. To help us, it is important that you fill out the paper we are sending you and return it to us as soon as possible. To help you we have enclosed a stamped envelope with our address on it. [Emphasis added.]

[86] I take from this that the issue of low return rates of on-reserve residents was known to at least Kenora District staff and that there was a concern about it.

[87] And, as I noted earlier, in 1994 Stach J. in *A.F.* drew specific attention to the fact that there was a serious issue with regard to the representativeness of the jury roll: the return rate was approximately 33% for Aboriginal on-reserve residents compared to 60% to 70% for non-Aboriginal residents. This should have put the province on notice that without attention there could be a problem resulting in a jury roll being unrepresentative and in breach of s. 11 of the *Charter*.

[88] The 1996 policy directive from MAG, PDB #563, which I will say more about below, distributed to Kenora District staff by the PJC provided the following, at 4:

> From the information you provide on numbers of questionnaires sent out, the Provincial Jury Office will have to determine numbers of questionnaires returned completed, numbers returned "undelivered", and numbers no return received.
>
> It is essential that we evaluate the results of these efforts as this is of extreme importance to the management of our jury system.

[89] Unfortunately, the evaluation that the PJC deemed "essential" did not take place until 2006 and the PJC blinded itself to evidence of what was actually occurring. That is, Stach J.'s observation in *A.F.* turned out to become even more serious. In 2002 the number of Aboriginal on-reserve resident returns, which itself was known to the PJC, had now declined to 15.8%.[9]

[90] In 2003, the number of questionnaires sent to off-reserve residents was increased from 800 to 1000. According to the PJC, this was due to the high number of Coroner's lists and the low number of "Native" returns. This suggests that, at least on some level, the PJC knew that there may be a problem with the representativeness of First Nations on-reserve residents on the jury roll. Indeed, the number sent to on-reserve residents was increased correspondingly.

[91] In June 2004, it appears that the issue of on-reserve representativeness was a recognized concern in the Kenora District. On this occasion, Ms. Loohuizen (about whom I will say more shortly), Justice Stach, Justice of the

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[9] Exhibit C, Affidavit of Shaun Joy. The exhibit notes that: "These figures are based on the historical records available to the PJC. Report prepared by Provincial Jury Centre Staff." There is no explanation that I know of as to why this calculation is available in 2002, but not for 2000-2001 and 2003-2005.

Peace Morrison, Rolanda Peacock and a PJC representative “brainstormed” ways to improve the participation of Aboriginal on-reserve residents in the jury process.

[92] In 2007, for the first time, the PJC advised Kenora District staff of the number of responses to the questionnaires sent to on-reserve residents.[10] Clearly though, up to this point the PJC knew for every year between 2000 and 2010 the total number of questionnaires sent to on-reserve residents in Kenora District and the total number of replies received. I would add that eligible off-reserve response rates province-wide were apparently being collected from the year 2000 onward.[11]

[93] Finally, at some level MAG actually knew about the historical problem of low response rates from Aboriginal on-reserve residents and was aware of it as an issue dating back to at least 2001.[12]

[94] In spite of this history of decreasing rates of returns of questionnaires by Aboriginal on-reserve residents, the province's efforts were concentrated almost exclusively on obtaining Band electoral lists or “any lists” that the First Nations

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[10] This breakdown included the number of responses that were determined to be eligible, the number of responses that were determined to be ineligible, the number of questionnaires returned by the post office, the number for whom the addressee was deceased, and the number of questionnaires to which there was no response.

[11] I say “apparently” because exhibit C to the Joy affidavit states that “[t]hese figures are based on the historical records available to the PJC.” On this basis, these figures either were collected or could have been collected at the time.

[12] Sheila Bristo, Acting Director, Corporate Planning Branch, CSD, cross-examination at 214-215.

would provide in order to create the jury roll for the Aboriginal on-reserve population. Virtually nothing was done to address the deteriorating rate of return of questionnaires.

A. S. 6(8) EFFORTS MADE BETWEEN 2000-2006

[95] Between 2000 and 2006, and predating it, the guidelines that applied to the performance of s. 6(8) duties were contained in a policy document from the Program Development Branch, Courts Administration Division of MAG: a 1996 policy directive entitled *Aboriginals Resident on Reservations to be Included on Jury Roll for 1997* (also known as "PDB #563"). PDB #563 was distributed annually by the PJC to local courts whose districts contained First Nations reserves, as part of the communication package that initiated the s. 6(8) work for the year. PDB #563 instructs all area CSD staff to:

- "ascertain, check and confirm the reserves located in your county or district";
- "attempt to obtain the band electoral list, or any other accurate list of residents, by writing letters, telephoning or visiting the reserves in your area";
- calculate the number of on-reserve questionnaires to be sent, using the proportionality formula provided, so that on-reserve residents would

receive the share of the questionnaires corresponding to their share of the population of the district;

- perform a random selection of the required number of names from “the best possible list”, and prepare and mail the questionnaires to these persons; and,
- provide interim and final reports to the PJC at various points in the process.

[96] The practice of CSD in applying this policy was that if a band electoral list – which was the preferred list to be used for this purpose – could not be obtained directly from the reserves in the district, CSD staff would use the lists requested from and provided by INAC, even though PDB #563 noted that the INAC band lists may not constitute the best list for use in terms of identifying who lives on a reserve.

[97] After INAC decided to stop providing band lists for this purpose, the PJC amended its annual communication package to local CSD offices to remove the reference to the INAC band lists. In all other respects, the communication remained largely unchanged. In the first year that INAC band lists stopped coming, staff were told to use lists from the previous year if Band lists were also not forthcoming.

[98] In a briefing note dated September 4, 2001, the CSD manager responsible for the PJC recommended that “CSD staff in the areas … where reserves are located should continue to follow written procedures with increased emphasis on making local contact with the Chief and other appropriate senior band officials to negotiate obtaining the best list of names available.” The note also recognized that “Ministry direction [was] required concerning the obtaining of the INAC lists in future years”.

[99] Since 2001, and throughout the time relevant to this appeal, it was Ms. Laura Loohuizen who had been almost solely responsible for carrying out the work related to s. 6(8) for Kenora District. Ms. Loohuizen assumed these duties soon after she began working at CSD Kenora in September of 2001 as judicial secretary/trial coordinator. She would continue to be responsible for s. 6(8) efforts even after her promotion to Group Leader within CSD in 2005. Ms. Rolanda Peacock, whose affidavit first brought the issue of the representativeness of the Kenora jury roll to light, was her immediate supervisor after this time.

[100] In her first year of employment, Ms. Loohuizen carried out the random selection of names from available INAC band lists from 2000. At this time, she had INAC band lists for 42 reserves of the 43 she believed (erroneously as it turns out) were in Kenora District; it appears that for one reserve –

Neskantaga/Lansdowne House – Ms. Loohuizen never had a record from which to complete the s. 6(8) work.

[101] Beginning sometime in 2002, Ms. Loohuizen became involved in the entire cycle of s. 6(8) work for the preparation of the 2003 jury roll. At this time, she reviewed and sought to implement the procedures set out in PDB #563. To this end, she made several inquiries to the PJC regarding how the steps outlined in PDB #563 were to be undertaken. Such inquiries would continue to 2007.

[102] By way of instruction, she sought direction on how updated lists were to be obtained. She was advised that new INAC band lists would not be supplied and that "[w]e have to attempt to obtain lists [of on-reserve residents] from the bands, failing that we use whatever list is available."

[103] In July of 2002, and in response to the PJC's instructions that she would have to get lists from the bands themselves, or use whatever list was available, Ms. Loohuizen wrote to the Chiefs of every First Nation for which she had an INAC band list from 2000, as well as to senior officials at NAN. No band lists resulted from this effort.

[104] As a result, Ms. Loohuizen continued to use the INAC band lists from 2000 for the purposes of calculating the number of on-reserve questionnaires to be sent and for the random selection of on-reserve residents. Indeed, throughout the

entire relevant time period, Ms. Loohuizen continued to use the 2000 INAC band lists if she was unable to obtain an updated band list.

[105] After 2002, and for the next three years, no efforts were made by Ms. Loohuizen to obtain updated lists of on-reserve residents. The efforts that were made in respect of jury roll preparation only involved the following:

- In June 2004, Ms. Loohuizen participated in a "brainstorming session" with Justice Stach, Ms. Peacock, a Justice of the Peace (who was also an Elder[13]), and an individual from the PJC in order to decide other ways to improve the participation of Aboriginal on-reserve inhabitants in the jury process.
- Also in 2004, Ms. Loohuizen requested information from the Elder with whom she participated in the brainstorming session about contact people in the Treaty 3 and Treaty 9 areas; she received no response.

[106] Throughout this period, Ms. Loohuizen again relied on the INAC band lists from 2000 for s. 6(8) purposes, continuing the practice of CSD in this regard. Obviously, because the INAC band lists only included individuals over the age of 18, these lists would have become increasingly inaccurate with each passing year, as individuals newly turned 18 would not be captured unless an updated

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[13] Very generally, and with respect and any necessary apologies, it is said that an Elder is traditionally an individual known in the Aboriginal community as a person who holds the knowledge, history, ceremonies, songs, dances and cultural traditions of the community. Elders are viewed by Aboriginal people as role models and they hold an esteemed place of respect in the Aboriginal community.

band list were obtained. This is a special problem for populations residing on reserve, which are generally disproportionately young. Any other changes in the interim, such as deaths or relocations, would also not be captured.

[107] In August 2006, Ms. Loohuizen once again wrote to each Chief of the 42 bands for which she had a 2000 INAC band list, requesting current lists from them. She received updated band lists from four, and no response from any of the others. As before, Ms. Loohuizen continued to use the 2000 INAC band lists in respect of the remaining 38 identified bands. For Neskantaga/Lansdowe House, she still had neither a band list nor an INAC list.

[108] During all of this time, there were no discernible changes in CSD's policies and practices with respect to s. 6(8) requirements. This may have been the result of insufficient attention being paid to the results of s. 6(8) efforts: while PDB #563 required that interim and final reports were to be prepared and sent by local offices to the PJC, these reports were routinely not prepared or did not contain the required information.

B. EFFORTS IN 2007 FOR THE 2008 JURY ROLL

[109] As I noted earlier, in January 2007, the PJC compiled the results of the 2006 questionnaires and communicated details of the response rates for the county or district to the local court locations; local court staff had not previously been advised of the response rates resulting from their efforts pursuant to s. 6(8).

Ms. Loohuizen learned that of the 484 questionnaires sent to on-reserve individuals in 2006, 349 were not returned; 82 were returned undelivered; and one was returned advising that the recipient was deceased. Of those that were returned, 15 were ineligible and only 37 were eligible. Statistically, there was only a 10.7% total response with 7.6% of the responses being found eligible. By comparison, the off-reserve eligible return rate was 56%. Almost 17% of the on-reserve questionnaires were returned as undeliverable.

[110] Ms. Loohuizen communicated these results to Justice Stach. As a result, the number of questionnaires to be sent out to on-reserve inhabitants was increased to 600 from 484 the previous year. Justice Stach and Ms. Peacock also determined that additional efforts would be made to improve representativeness.

[111] In July 2007, Ms. Loohuizen sought assistance in identifying the boundaries of the district, and the reserves within it for which she was responsible, particularly in the northeast region. It appears that this was the first time she made such an inquiry, and it may have been prompted by questions that were arising in relation to an upcoming coroner's inquest in Kashechewan.

[112] From this inquiry she learned for the first time that she had been excluding two bands from the s. 6(8) efforts entirely. She also learned another reserve on her list had split, resulting in two separate communities. Thus, her list of First

Nations within Kenora District grew from 43 to 46.[14] By the time the error was discovered, there was insufficient time to make significant efforts to obtain lists in respect of these communities.

[113] During the summer of 2007, Ms. Loohuizen and Darrell Mandamin, CSD's interpreter liaison for the Northwest Region, travelled with a court party to 15 fly-in reserves to meet with members of band leadership to discuss Aboriginal participation in the jury system. As a result of these visits, eight updated lists were obtained. Ms. Loohuizen followed up with the other seven, but did not receive lists.

[114] Ms. Loohuizen and Mr. Mandamin also sought meetings with four First Nations located near Kenora, successfully meeting with leaders from two of them. Unfortunately, no lists were ultimately received from these meetings, despite subsequent follow-ups. Attempts made to contact an additional ten First Nations to arrange for in-person meetings or telephone discussions were unsuccessful, and no lists were obtained as a result.

[115] On the basis of these efforts, when the s. 6(8) questionnaires for the 2008 jury roll were to be mailed out in the fall of 2007, the Kenora CSD had the following derived from 46 First Nations in the district:

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[14] Saugeen First Nation, which was mistakenly included within the reserves of Kenora District, continued to be included for s. 6(8) purposes even after CSD confirmed the boundaries of the district.

- Band lists from 2007 in respect of eight First Nations;
- Band lists from 2006 in respect of two First Nations;
- INAC lists from 2000 in respect of 32 First Nations; and
- No list for four First Nations.

[116] It is obvious that the vast majority of the source lists for s. 6(8) purposes for the 2008 jury roll were out-dated. The INAC band lists, which were used for a sizable portion of the District's population, would not include, by this time, people who had become adults since 2000. In addition, they would not capture on- and off-reserve movement within the populations of these 32 First Nations.

[117] For the purposes of the 2008 jury roll, 1200 questionnaires were sent to the off-reserve municipal population of Kenora District. Pursuant to a direction from Justice Stach, 600 questionnaires were sent to the on-reserve population. This was an increase from the previous year and was greater than the proportional share of notices required based on the CSD formula.

[118] The results of the 2007 efforts ultimately became known to Ms. Loohuizen in February of 2008, when it was learned that of the 600 on-reserve questionnaires that were sent, only 60 were returned: a 10% return rate. Of these, 34 persons (or 5.7% of the 600) were found to be eligible for jury service. 166 questionnaires (or 27.7%) were returned by the post office. In respect of 374 questionnaires (or 62.3%), there were no responses. By comparison, the off-

reserve eligible response rate was 55.6%. It can be seen, therefore, that the result of the state's efforts to compensate for the loss of the yearly INAC band lists as of 2001 were less than ideal.

[119] The 2008 jury roll for Kenora ultimately consisted of 699 potential jurors, of whom 29 were on-reserve residents.[15] This represents 4.1% of the jury roll, even though First Nation residents represented about 33% of the Kenora District's population.

[120] Mr. Kokopenace's jury was selected on May 27, 2008 from a panel list of 175 jurors; 8 of these were on-reserve residents. Of these 8, 4 were from fly-in reserves and 4 had road or boat access to Kenora. Three of the 8 were ultimately excused to later sittings without having attended court; 1 was excused entirely without having attended court; and 2 did not respond to the summons. Mr. Kokopenace's jury ultimately did not include any on-reserve residents.

THE STATE'S SPECIAL RELATIONSHIP WITH ABORIGINAL PEOPLE

[121] The state's knowledge of decreasing returns, and the efforts made to address this issue, must be evaluated in the context of the state's special relationship with Aboriginal people.

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[15] Again, this figure as presented by counsel for the appellant does not appear to be disputed by the respondent.

[122] Aboriginal people hold a unique legal and constitutional position in Canada that is recognized in historical instruments such as the *Royal Proclamation of 1763*, and constitutional instruments such as s. 91(24) of the *Constitution Act, 1867*, which gives Parliament legislative authority over “Indians, and Lands Reserved for the Indians”. Further recognition of the unique position of Aboriginal people is found in pre- and post-Confederation treaties, entered into largely in Ontario and the western provinces, with the exception of British Columbia. Finally, s. 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Canada’s Aboriginal peoples, defined as including Indian, Inuit and Métis peoples.

[123] A considerable body of jurisprudence has attempted to define and characterize the special relationship between the Crown and Aboriginal people that arises out of and upon this historical foundation. Some of that jurisprudence is relevant to the analysis necessary to this appeal. Among the principles that have developed is the honour of the Crown. As the Supreme Court stated in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 66, “[t]he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.” Because of its connection with s. 35 of the *Constitution Act, 1982*, the honour of the Crown has been called a “constitutional principle”: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42.

Furthermore, “the honour of the Crown imposes a heavy obligation”: *Manitoba Metis* at para. 68.

[124] Typically, the honour of the Crown has been invoked in the context of Aboriginal or treaty rights, as recognized under s. 35 of the *Constitution Act, 1982*. (See e.g. *Manitoba Metis* at para. 68.) *Haida*, for example, was concerned with a potential Aboriginal claim to land title.

[125] Nonetheless, previous decisions by the Supreme Court have explicitly and repeatedly stated that the principle of the honour of the Crown is always engaged where Aboriginal peoples are concerned. See *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 49: “This appeal puts to the test the principle, emphasized by this Court on several occasions, that the honour of the Crown is always at stake in its dealings with aboriginal people.” See also *Haida* at para. 16, where McLachlin C.J., writing for the court, stated that “[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples”.

[126] The Supreme Court now appears to have retreated from this position. Instead, “not all interactions between the Crown and Aboriginal people” engage the honour of the Crown; more specifically, it will not be engaged by “a constitutional obligation in which Aboriginal peoples simply have a strong interest” or one “owed to a group partially composed of Aboriginal peoples” (*Manitoba Metis*, at paras. 68 and 72). I note that the rights at stake in this appeal

are grounded in legal rights under s. 11 of the *Charter*, which are shared by all in Canada. They are not Aboriginal rights *per se*, at least as ordinarily contemplated by s. 35.

[127] However, Ontario has chosen to implement this constitutional obligation through a statutory scheme – s. 6(8) of the *Juries Act* – that explicitly treats Aboriginals (specifically, those living on reserve) separately and differently from the remainder of the population. In such circumstances, the principle of the honour of the Crown is engaged to the extent that this historical context must be kept in mind when assessing Ontario's conduct for constitutional sufficiency.

[128] To be clear, the honour of the Crown attaches not because the appellant is Aboriginal, but because the means through which Ontario has chosen to fulfill the appellant's constitutional right to a representative jury requires the government to interact with Aboriginal people differently than with all other people. It is the manner of that interaction to which the honour of the Crown applies.

[129] The honour of the Crown is the source of different legal duties in different circumstances: see *Haida* at para. 18 and *Manitoba Metis* at para. 73. In *Haida*, the Supreme Court held that the honour of the Crown gave rise to a duty on the Crown to consult with Aboriginal people and, if necessary, accommodate Aboriginal interests, where the Crown's conduct might affect an Aboriginal claim

or right, established or potential. The Crown's efforts at consultation should be consistent with the objective of reconciliation.

[130] It was not argued that the duty to consult is engaged in this case. In most cases thus far where the duty to consult is engaged there is an Aboriginal right or treaty right that is being affected by the Crown's conduct or planned conduct.

[131] In any case, the concept of the duty to consult can nonetheless be informative of whether Ontario's efforts were reasonable in this case, particularly since the respondent submits that both its conduct and its legislative design with respect to jury roll composition "see[k] the cooperation of people living on reserves". The Crown points in that regard to the evidence of Ms. Bristo, Acting Director, Corporate Planning Branch of the Court Services Division of the Ministry of the Attorney General, where she said that their approach

> has been trying to engage with the First Nations in a very upfront way to develop the partnerships and trust and understanding so that we can learn about their issues, but then also they can understand the importance of the jury process and being on a jury and their participation on a jury.

[132] In *Haida*, at para. 45, McLachlin C.J. applied the concept of the duty to consult to potential rights claims and observed that the scope of consultation would lie on a spectrum. In all cases, the "controlling question" would be "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."

[133] Given the need to engage the Aboriginal people living on reserves in the Kenora District in addressing the representation problem on Kenora jury rolls – a need Ontario recognizes – it can hardly be denied that the Crown ought to have engaged in meaningful consultation in good faith in the problem's resolution. An effective resolution would require the good faith participation of the Aboriginal people in return. In this regard, I would adopt as instructive the New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) at 31, excerpted in *Haida* at para. 46:

> … genuine consultation means a process that involves:
>
> - gathering information to test policy proposals;
> - putting forward proposals that are not yet finalized;
> - seeking Maori opinion on those proposals;
> - informing Maori of all relevant information upon which those proposals are based;
> - not promoting but listening with an open mind to what Maori have to say;
> - being prepared to alter the original proposal; and
> - providing feedback both during the consultation process and after the decision-process.

[134] It is in the light of these principles, which are consistent with the honour of the Crown, that the Crown's efforts in respect of jury roll preparation should be evaluated in this case.

THE STATE'S KNOWLEDGE OF ABORIGINAL ESTRANGEMENT FROM THE JUSTICE SYSTEM

[135] In addition to the above, the problem of underrepresentation in the Kenora jury roll must be viewed in the light of a second contextual element, and that is the evident and frequently remarked-upon overrepresentation of Aboriginal persons in Canadian prisons. This overrepresentation is the manifestation of a fundamental estrangement of Aboriginal persons from the criminal justice system.

[136] A few key figures serve to illustrate the scope of this estrangement. Although Aboriginal people constitute less than 4% of the general Canadian population, Aboriginal offenders make up 20% of federal penitentiary inmates. This overrepresentation is more pronounced for Aboriginal women, who account for 41% of all women in sentenced custody.[16]

[137] Canadian courts have not only commented on the stark reality of Aboriginal overrepresentation in the criminal justice system, but they have also observed its roots in an attitude of discrimination that pervades the administration of justice.

[138] In *R. v. Williams*, [1998] 1 S.C.R. 1128, at paras. 57-58, the Supreme Court of Canada upheld the right of an Aboriginal accused to challenge jurors for cause where there is a realistic potential for partiality or prejudice in the community. In

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[16] This figure is for 2010-2011 and includes both provincial and federal custody. See Mia Dauvergne, "Adult correctional statistics in Canada, 2010/2011", Juristat 2012 at 11, online: Statistics Canada <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=85-002-X201200111715&lang=eng>.

so holding, the court noted the evidence of widespread racism against Aboriginal persons that has translated into systemic discrimination in the criminal justice system.

[139] One year later, that court in *R. v. Gladue*, [1999] 1 S.C.R. 688, considered the proper application of the sentencing principles in s. 718.2(e) of the *Criminal Code* within the context of a criminal justice system that had failed Aboriginal peoples. The court had before it extensive evidence that Aboriginal people were overrepresented in the criminal justice system as offenders. On the basis of that evidence, the court directed judges to be cognizant of systemic factors arising out of the history of Aboriginal relations in Canada that bear on an offender's culpability.

[140] For the next thirteen years, the Ontario judiciary attempted to address the "crisis in the Canadian criminal justice system" through the application of the *Gladue* principles. In *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664 (C.A.), for example, this court restated the trial judge's duty to give effect to the *Gladue* principles, and reemphasized their importance in the struggle to address the systemic discrimination faced by Aboriginal people in the criminal justice system. In Ontario, *Gladue* courts were created in October 2001 through the efforts of judges, academics and community agencies, including Aboriginal Legal Services of Toronto, with the cooperation of the Attorneys General for Ontario and Canada as well as Legal Aid Ontario.

[141] Despite the ominous warnings in both *Gladue* and *Kakekagamick*, the Supreme Court of Canada's decision in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 describes, at para. 62, only a worsening situation. The question in *Ipeelee* was how to determine a fit sentence for the breach of a long-term supervision order in the case of an Aboriginal offender. In allowing the appeal,[17] the Court observed that the overrepresentation of Aboriginal people in the criminal justice system as offenders is worse than ever, and repeated its message from *Gladue* with a renewed urgency.

[142] In recent years, this court has come to the recognition that the *Gladue* principles properly extend beyond sentencing for criminal offences, and that *Gladue*'s underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system. These have included extradition (see *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 490), sentencing for civil contempt (see *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 O.R. (3d) 1, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 357), and dispositions of persons found not criminally responsible on account of mental disorder (see *R. v. Sim* (2005), 78 O.R. (3d) 183).

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[17] The appeal in respect of the appellant Ipeelee was allowed; the appeal in respect of the appellant Ladue, which was heard and decided together with that of Ipeelee, was dismissed.

[143] This extension was implicit in the recognition in *Gladue*, at para. 65, and *Ipeelee*, at para. 61, that sentencing innovation alone would not solve the greater alienation of aboriginal people from the criminal justice system.

[144] Both *Gladue*, at para. 61, and the earlier decision of *Williams*, at para. 58, also recognized that the overrepresentation of Aboriginal peoples as accused was only the tip of the iceberg in terms of the ways in which the criminal justice system was failing Aboriginal peoples. The underrepresentation of Aboriginal peoples on the jury roll illustrates another part of the same iceberg, sharing the same root causes: a relationship marked by tensions originating in the colonial era.

[145] Judges have been directed to take judicial notice of how the history of colonialism continues to translate into, among other things, higher levels of incarceration for Aboriginal peoples as part of the context in which the sentencing inquiry must take place: *Ipeelee* at para. 60. Outside the sentencing context, the import of cases extending the *Gladue* principles may be the idea, suggested in *Ipeelee* at para. 71 and affirmed in *Leonard* at para. 52, that, because of the continuing significance of this history, “to achieve real equity, sometimes different people must be treated differently”.

[146] I can see no reason why the reasonableness of the state’s efforts in respect of s. 6(8) of the Act – a provision that is directed to the proportional

representation of Aboriginal people residing on reserve on the jury roll for a given community – should not be viewed in the light of this same context.

[147] MAG, in its prosecutorial role, has been on the front lines of this crisis. It could not have escaped knowing about the alienation of Aboriginal people from the criminal justice system, or the direction from the courts since *Gladue* that it is a problem that must be addressed.

[148] Despite this, the current low rates of jury participation of First Nations persons residing on reserve in Kenora represent a decline. As reflected in *A.F.*, the return rate for completed jury service notices from the First Nations community in 1993 was 33%. While not high, the return rate in the wake of the state's efforts in 2007 for the preparation of the 2008 jury roll in Kenora dropped even further to only 10%.

[149] To those who argue that Aboriginal on-reserve residents have a particular antipathy or reluctance to serving on juries, I would make two observations. First, the participation of Aboriginal people with the jury system began only relatively recently. As Mark Israel notes in "The Underrepresentation of Indigenous People on Canadian Jury Panels" (2003) 25(1) Law and Policy 37 at 39-40, jurors used to be selected from voter lists, and First Nations people did not have universal franchise until as late as 1969. As a result, the Inuit only began serving as jurors in 1957 and other Indigenous Canadians as late as 1972.

[150] Second, the Iacobucci Report observes at 53 that, “it is clear that the jury system in Ontario, like the province’s justice system more generally, and its counterparts across a variety of Canadian and international jurisdictions, has often ignored or discriminated against aboriginal persons”. The Report then goes on, as I noted earlier, to identify several reasons, expressed by First Nations’ representatives, for the reluctance of First Nations persons to engage in the criminal justice system, including the jury system in Ontario. In light of these reasons, Mr. Iacobucci observes at 56 that, “It is understandable that First Nations people are reluctant to participate in the justice system, and particularly on juries, when their interactions with the system are anything but positive, respectful, or fair”.

[151] Any assessment of the state’s efforts must, therefore, have regard to this reality as well as the broader problem of Aboriginal estrangement from the criminal justice system, and look to whether the state was aware of the need to achieve real equity in respect of Aboriginal participation on juries, and the further and different efforts that this might require.

DEFINING THE “STATE” FOR THE PURPOSES OF THE REQUIREMENTS OF S. 6(8) AND, CONSEQUENTLY, SS. 11(D) AND (F) OF THE CHARTER

[152] The “state” for the purposes of s. 6(8) of the Act is the province of Ontario. When assessing the efforts of the state in order to determine their reasonableness, it is important to distinguish between efforts undertaken at the

Kenora District level and those efforts undertaken provincially. As I will explain, this is critical to the context in which this analysis must be undertaken.

[153] Although s. 6(8) refers to the responsibility of the "sheriff" for the efforts to ensure representation of Aboriginal on-reserve residents on the jury roll, these responsibilities – including selecting names of eligible on-reserve residents in the "same manner as if the reserve were a municipality" from "any record available" – are, in fact, more widely distributed. The sheriff for the purposes of the Act is the one referred to in s. 73 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), who has been appointed under Part III of the *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35, Sched. A.

[154] As explained briefly above, the sheriff's jury-related duties in respect of a given county or district are actually divided among various court services employees who have been assigned the powers of sheriff, or act on the instruction of those holding assigned powers, pursuant to s. 73(2) of the *CJA*.

[155] In addition, the reality is that the steps that can be taken at a local level are heavily circumscribed in practice. The entire process is coordinated centrally by the province, and both court services and PJC staff are responsible for following policies set centrally, as opposed to changing them. In the ordinary course, therefore, Ontario's responsibility under the Act involves more than just the area CSD offices. The entities involved include all of the following:

- Director of Assessment, Municipal Property Assessment Corporation: MPAC identifies those off-reserve who are to receive notices by random selection from the most recent municipal assessment, provided they are residents of the county or district, Canadian citizens and at least 18 years of age.
- The Ministry of Revenue (as it then was): This ministry receives completed questionnaires from off-reserve residents and determines eligibility to serve as a juror in accordance with the *Juries Act*. The data for eligible persons is then sent to the PJC.
- The Ministry of the Attorney General: MAG is the department of the Ontario government that is responsible for the oversight of the justice system within the province.
- Court Services Division ("CSD"): The division of MAG that provides administrative and courtroom support to all judicial officers in the Superior Court of Justice and the Ontario Court of Justice. Court staff provide for courtroom clerks, court reporters, registrars, and court interpreters required for court proceedings. With respect to managing the jury system, local CSD staff fulfill the sheriff's responsibility of determining the number of jury notices to be sent for the following year, based on anticipated jury demands and other factors. They also, in respect of on-reserve residents, select the

individuals to receive questionnaires, and prepare and mail out the questionnaires.

- Provincial Jury Centre ("PJC"): This entity is responsible for the administration of the jury system for the Province of Ontario, including the annual preparation of the jury roll and the random selection and summoning of potential jurors. The PJC communicates to MPAC the required number of off-reserve jury notices to be sent for each county or district each year. In addition, it enters the list of eligible potential jurors that results from responses to service notices onto the jury roll, in respect of both on-reserve and off-reserve returns.

- The Director of Court Operations for the West Region: The CSD official who performs the sheriff's responsibility of certifying each jury roll as "the proper roll prepared as the law directs".

[156] In addition, with respect to individuals other than Aboriginals residing on reserve, MAG retains as agent the private third-party vendor DST Output Canada Inc. for the provision of mailing and printing services.

[157] What the above illustrates is that for purposes of carrying out its duties under the *Juries Act*, the state is comprised of much more than a district CSD office or any one employee. Thus, for the purpose of assessing whether the state took reasonable steps in the process of compiling the jury roll, more than just the

efforts of CSD in Kenora will need to be considered. Any fair assessment, in my view, requires that the state be defined more broadly and, at the very least, including MAG, in order to take into account the practical realities of how the jury roll preparation process is undertaken in Ontario. This is particularly important given the state's special relationship with Aboriginal people and the responsibilities this entails.

ANALYSIS

[158] As I explain above, any analysis of the state's efforts in respect of jury roll preparation must be a contextual one. It is only then that the true significance of First Nations persons' estrangement from this aspect of the administration of justice is understood.

1. REASONABLENESS OF THE STATE'S EFFORTS IN RESPECT OF JURY ROLL PREPARATION PURSUANT TO S. 6(8) OF THE ACT

[159] As I have stated, one question that underlies the analysis of the reasonableness of the state's efforts in respect of the preparation of the jury roll for 2008 for the purposes of ss. 11(d) and (f) of the *Charter* is whether the state delivered jury service notices to Aboriginal on-reserve residents and facilitated their return sufficiently to allow them a fair opportunity to have their distinctive perspectives included in the jury roll. This assessment is a contextual exercise in all respects, taking into account both the history of practices since at least 2001,

when INAC band lists ceased to be provided to CSD, and also the state's special relationship with Aboriginal people and the responsibilities that entails.

[160] The state must demonstrate that it exercised diligence, resourcefulness, ingenuity and persuasion in this regard: *R. v. Nahdee* (1993), 26 C.R. (4th) 109 (Ont. C.J. (Gen. Div.)) at para. 20.[18] If the state simply accepted the repeated failure to secure responses to its efforts, the efforts will be shown to be unreasonable.

[161] On this record, the state was faced with two discrete problems. The first was obtaining accurate up-to-date lists of Aboriginal on-reserve residents. The second was the deteriorating rate of return of questionnaires from the on-reserve residents. While the focus of my analysis will primarily be from 2000, I would note again that in 1993 the return rate for Aboriginal on-reserve residents was roughly half of that of the non-aboriginal community.

[162] The first thing to be observed of the state's efforts in respect of the preparation of the jury roll, both before and including the efforts for the 2008 jury roll, is that they were almost exclusively those of Ms. Loohuizen. She had some assistance and supervision in respect of her efforts – from Justice Stach, from Mr. Mandamin, and others – but the lion's share of the effort was hers.

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[18] I note that this case focused on the sheriff's compliance with s. 6(8) in obtaining "any list available", as opposed to a *Charter* claim (although the decision did mention the *Charter*).

[163] By 2002, the PJC would have been aware that Ms. Loohuizen had unanswered questions about the s. 6(8) process and was having difficulty obtaining up-to-date band lists. She had made several inquiries of them by this point, but it appears that no greater instruction was given than to continue using existing INAC band lists because no further lists were likely to be forthcoming.

[164] PDB #563, the policy which was distributed annually by the PJC, called for interim and final reports to be made in respect of s. 6(8) work, but these reports were routinely not provided.

[165] In 2007, the PJC for the first time began providing Kenora District staff with data on the responses to on-reserve questionnaires, in respect of the 2006 mailouts for the 2007 jury roll.[19] The record does not disclose any reasons why the PJC did not provide this data to District staff in earlier years. I would observe that response rates in respect of off-reserve questionnaires throughout the province and for Kenora specifically were apparently available in each year from 2000 onward.[20] In any case, the 2007 results for Kenora, particularly the fact that the total response rate for that year was only 10.7%, with only 7.6% of the responses being found to be from eligible jurors, show that by any standard or objective analysis, there ought to have been concerns about whether Aboriginal on-reserve residents were underrepresented on the Kenora jury roll.

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[19] It appears that data collection documenting response rates was done for the judicial district as a whole. Reserve-by-reserve data compilation would only begin in 2009.

[20] Again, I say “apparently” because this evidence was “based on historical records available to the PJC.”

[166] Because data in respect of response rates for each district only began to be communicated to local court locations after 2006, no one appears to have been in a position to identify the precise extent of the ongoing problem prior to that time,[21] or determine what efforts might be required to ameliorate them. There is no question that Ms. Loohuizen's own efforts could have begun much earlier than they did.

[167] But, while MAG should have known much earlier, there can be no doubt that by January 2007, it knew there were problems with the representation of Aboriginal on-reserve residents on the jury rolls in Kenora. Although it is clear from the briefing note of September 4, 2001 that the PJC was awaiting direction from MAG regarding INAC's decision to stop providing lists and efforts to obtain INAC band lists in future years, no significant attempts in respect of other data sources appear to have been made; no changes were made to the governing policies; and no sustained Ministry efforts to obtain lists from INAC appear to have been made or directions given. CSD's Kenora office and Ms. Loohuizen continued their efforts, essentially alone.

[168] The evidence also shows an absence of necessary training or oversight of local court staff by MAG with respect to s. 6(8) work and the particular

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[21] In her cross-examination, Ms. Bristo acknowledged that MAG was aware of the historic low rates, if not the exact extent.

understanding in respect of First Nations in Ontario that is necessary to doing that work.

[169] Ms. Loohuizen herself, for example, undertook the s. 6(8) work without any specific training in this regard, including any particular instruction on how to distinguish between a reserve (a plot of land designated under the *Indian Act*) and a First Nation or a band. Responses to her inquiries to the PJC were not particularly helpful, and could not compensate for this lack of training.

[170] The training and oversight systems that were implemented beginning in 2008, evidence of which comprised part of the fresh evidence on this appeal, were certainly not in existence in 2007 when the jury roll at issue in this appeal was compiled.

[171] It can be reasonably concluded that some significant errors in the s. 6(8) efforts in Kenora that would have had an impact on representativeness can be attributed to this basic lack of attention. Among other things, three errors in particular can be set apart.

[172] First, when Ms. Loohuizen first began her s. 6(8) work, she identified 43 reserves in the Kenora District. This number incorrectly excluded three reserves, and mistakenly included one. This error would not be corrected until 2007. Even though this error was discovered prior to the compilation of the 2008 jury roll,

there was insufficient time to compensate for it, with the results that these three First Nations were entirely excluded from the 2008 jury roll.[22]

[173] The failure even to properly identify the reserves within the boundaries of the judicial district is one of the most compelling errors in favour of the appellants; because of this misapprehension, eligible prospective jurors from these communities were excluded entirely from the 2008 jury roll and deprived of a meaningful chance to have their perspectives considered. Although I have used the phrase “the distinct perspectives of Aboriginal on-reserve residents” in setting out the representativeness issue, I do not mean to suggest that all Aboriginal on-reserve residents in Ontario, or all those within Kenora District, are a homogenous group that shares uniform perspectives. Each reserve is a separate community, and the exclusion of one – or in this case, three – weakens representativeness.

[174] Second, the formula prescribed by PDB #563 for determining the number of on-reserve questionnaires required to be sent in a particular year is based on estimates set out in a separate policy document, one which was not provided to Ms. Loohuizen. In its absence, and with no other guidance as to how to form the necessary estimates, Ms. Loohuizen made her own estimates of the jury-eligible population of each reserve by counting the number of adult names on each list in

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[22] This is in addition to a fourth, Neskantaga/Lansdowne House, for which Ms. Loohuizen also lacked a list.

her possession. Given that her estimates were made from out-of-date lists, it is reasonable to assume this approach would compound distortions and underestimate the population on which the formula should be based.

[175] Finally, another clear error made by Ms. Loohuizen can be attributed, on the one hand, to MAG's failure to appreciate the importance of a major legal development to the policy governing the jury roll preparation process and, on the other, to Ms. Loohuizen's inadequate instruction regarding the nature of available lists.

[176] Because the MPAC enumeration process captures Aboriginal persons living off-reserve, it is important that the s. 6(8) process only include those individuals residing on-reserve. The ideal source list for the purposes of s. 6(8) would be an up-to-date list, with addresses, of all adults resident on a given reserve. If a source list contains individuals who actually reside off-reserve, steps will need to be taken either to remove those individuals from the s. 6(8) enumeration or, alternatively, to otherwise compensate for the over-inclusive nature of the list. It must be recognized that Aboriginal off-reserve residents may potentially have different perspectives than Aboriginal on-reserve residents.

[177] The evidentiary record in this case supports a reasonable conclusion that the INAC band lists from 2000, at least, likely included on-reserve residents only. These lists were inaccurate in other respects, because of how dated they were

by the time the jury roll for 2008 was being prepared, but did not give rise to this particular distortion. However, throughout the period relevant to this appeal, the lists requested and received from the Bands themselves were sought in accordance with PDB #563, which provides that a “band electoral list” is the preferred source for the names of on-reserve residents for the purposes of s. 6(8).

[178] When this policy was first distributed, this instruction likely did refer to the best available source for the purposes of s. 6(8). At the time, s. 77(1) of the *Indian Act* restricted voting in respect of elections under the *Indian Act* regime to members “ordinarily resident on the reserve”. Accordingly, a voter’s list or band electoral list would only have included the names of those residing on the reserve.

[179] In 1999, the Supreme Court of Canada released its decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, which held that s. 77(1) of the *Indian Act* violated s. 15 of the *Charter*. After the declaration of invalidity imposed in that decision expired the following year, and *Indian Act* regulations were amended to give effect to the decision, the electoral lists for *Indian Act* elections included band members residing both on- and off-reserve.

[180] Since 2000, then, the policy instruction on the basis of which the entire s. 6(8) process was undertaken has been incorrect in a way that is directly related

to the question of the representativeness of the jury roll. Ms. Loohuizen's evidence was that she had been asking for band electoral lists in accordance with the instructions. There is no evidence that any steps were taken by CSD or the PJC to update their practices in light of this change in the law during the time relevant to this appeal, and no evidence that Kenora District staff received instructions on how to determine the nature of the lists provided or why it mattered.

[181] The evidence shows that Ms. Loohuizen knew prior to this that the band electoral lists she was provided with included off-reserve individuals, yet she continued to use these lists, without removing off-reserve individuals, to determine who would receive questionnaires. The evidence also shows that Ms. Loohuizen did not learn until 2011 that individuals residing off the reserve should not be included in the s. 6(8) enumeration.

[182] The practical effect of *Corbiere* is that it made any band electoral lists obtained from First Nations after its release much less valuable in terms of their utility for meeting the requirements of s. 6(8) and identifying on-reserve residents eligible to serve on local juries, unless independent steps were taken to compensate for the inclusion of eligible voters living off reserve.

[183] Everyone is presumed to know the law and to act accordingly: *Beauregard v. Canada*, [1986] 2 S.C.R. 56. Certainly, of all entities, the Ministry of the

Attorney General can be presumed to know the law, including changes to it and the implications of those changes. Yet, the evidence shows that CSD staff in Kenora, at any rate, only became aware of the significance of *Corbiere* to the utility of band electoral lists when the issue was raised in cross-examination in connection with these appeals – 12 years after the decision was released. The issue was addressed for the first time in CSD policy documents and practices in training materials prepared in August 2011. Overlooking a legal change of this nature demonstrates a considerable lack of attention and a high degree of indifference to the problem.

[184] It is important at this point to repeat what source lists CSD in Kenora had for the purpose of preparing the jury roll for 2008:

- Band lists from 2007 in respect of eight First Nations, and from 2006 in respect of two other First Nations;
- INAC lists from 2000 in respect of 32 First Nations; and
- No list for four First Nations.

[185] Therefore, the jury roll at issue in the present appeal was compiled, in respect of 42 of the 46 First Nations in the judicial district, from records that were objectively either significantly out-dated or inaccurate in a way that would give rise to distortions in representation. The state knew or ought to have known

about these deficiencies in the source lists, and the evidence shows at least seven years where very little was done to ameliorate the situation.

[186] I would note, also, that even if Ms. Loohuizen's efforts in 2007 had resulted in the provision of more band electoral lists from bands in the district, her lack of understanding about the nature of the lists, and the state's failure to take steps to account for the legal implications of the *Corbiere* decision, would likely still have caused distortions that would give rise to concerns about the representativeness of the jury roll. It is reasonable to think the above may explain why the increase of jury service notices for the 2008 jury roll by Justice Stach did not result in a corresponding increase in eligible responses.

[187] The exact impact of these errors, in a quantitative sense, cannot be known on this record. However, the cumulative inaccuracies in the source lists inevitably bear on the likelihood that sufficient questionnaires would have reached individuals residing on-reserve. The state's apparent willingness to rely on a data source that, for any number of reasons, demonstrated significant inaccuracies leads inevitably to the conclusion that – even on the Crown's own proposed test – it did not make reasonable efforts to ensure an "honest and fair" process, the end result of which would be to allow Aboriginal on-reserve residents a fair opportunity to have their distinctive perspectives included in the jury roll.

[188] The appellant has met his burden in respect of ss. 11(d) and (f) of the *Charter*.

[189] I would add that the purpose of going through these errors is not to make an example of Ms. Loohuizen or her efforts. It is clear that she was aware of the low level of on-reserve Aboriginal representation in the jury process – the copious records she maintained attest to this – and was attempting, in her own way, to address it. Throughout the relevant periods, she undertook several efforts that, although not relevant to the preparation of the jury roll, demonstrated her concern with increasing First Nations participation in this aspect of the administration of justice.

[190] For example, by 2005, Ms. Loohuizen had begun to assist First Nations persons who had received a jury summons to attend court for jury panel purposes, including by phoning prospective jurors to help with travel arrangements and ensuring they understood that they did not have to pay to attend.

[191] She also began including CSD's toll-free number on juror summonses in order to encourage recipients to call if they had questions about the process. In addition, she continued the practice, which predated her employment with the CSD, of sending explanatory letters in plain English with the jury questionnaires, as well as translations into Ojibway and Oji-Cree native syllabics.

[192] In her capacity as trial coordinator, Ms. Loohuizen observed that the travel days posed a substantial hardship to prospective jurors travelling from remote reserves. For example, with no scheduled weekend flights from the more remote fly-in reserves, the prospect of responding to a summons for a jury panel to be heard on Monday involved a five-day ordeal involving flights, taxis, buses and a weekend stay in a hotel. Consequently, in 2006, CSD Kenora began calling jury panels to appear on Tuesdays, rather than on Mondays, to assist in shortening the travel time for those coming from remote reserves.

[193] Her efforts in 2007 to meet in person with band leadership in the fly-in communities in the northeast to discuss jury roll representation were marked by her respect and her appreciation of the band leadership's willingness to meet with her to discuss the issue of Aboriginal representation in the jury system.

[194] Again, there is no question that Ms. Loohuizen remained dedicated to the principle of representativeness and made her own best efforts to fulfil her obligations under the *Juries Act*. However, it is the state's efforts that are at issue in a broader sense. Its approach, as set out in the September 2001 briefing note, to "continue to follow written procedures" with increasing emphasis on negotiating to obtain the "best list of names available" was manifestly unreasonable for all of the reasons set out above.

C. ADDITIONAL COMMENTS ON THE NATURE OF THE STATE'S ENGAGEMENT WITH FIRST NATIONS ON THIS ISSUE

[195] MAG's approach to the resolution of the problem of representativeness of on-reserve Aboriginals on jury rolls has been to leave the process in the hands of junior members of the public service, in this case, Ms. Loohuizen. From PDB #563 and the September 2001 briefing note, it is clear that local CSD staff are designated as the representatives of the state directed to "make contact" with Chiefs and "other appropriate senior band officials" to negotiate for band lists.

[196] The Crown describes the province's approach as one of cooperation. They rely on Ms. Loohuizen's evidence that she considered "trust and respect" to be at the core of the relationship between CSD and on-reserve communities. She described that she had attempted to develop positive relationships with reserve communities in her effort to gain greater representation for First Nations people on juries within the Kenora District.

[197] During the time relevant to this appeal, Ontario and MAG had an "Aboriginal Justice Strategy" in place to address the specialized needs of Aboriginal communities in justice-related areas. The strategy advanced the goal of working with Aboriginal communities to develop an integrated justice policy framework. A government publication setting out this initiative, among others, notes the following commitment:

> Ontario is committed to addressing these issues through the development of an Aboriginal Justice Strategy, together with Aboriginal partners. Our new approach will pursue effective ways to work together, reflecting the diverse needs of rural and urban Aboriginal communities, with an emphasis on prevention for children and youth and promoting community safety. (Ontario Native Affairs Secretariat, *Ontario's New Approach to Aboriginal Affairs* (Toronto: Queen's Printer for Ontario, 2005) at 18 ["*New Approach*"].)

[198] The objectives of the strategy are to reduce overrepresentation of Aboriginals in the justice system; increase access to the full range of criminal justice services; increase participation in the administration of justice; promote justice sector knowledge; and explore traditional justice and customary law. (Ministry of the Attorney General, "Aboriginal Justice Strategy", online: MAG <http://www.attorneygeneral.jus.gov.on.ca/english/aboriginal_justice_strategy/default.asp>).

[199] The *New Approach* document also indicated at 3 that "Ontario recognizes that First Nations have existing governments and is *committed to dealing with First Nations' governments in a co-operative and respectful manner that is consistent with their status as governments*"(emphasis added).

[200] Until 2007, the lead on Aboriginal affairs within the Ontario government was the Ontario Native Affairs Secretariat ("ONAS"), later the Ontario Secretariat of Aboriginal Affairs ("OSAA"). These bodies were the Ontario government's representatives in trilateral negotiations with senior federal government officials

and Ontario First Nations Chiefs in connection with efforts to resolve a variety of Aboriginal issues of mutual concern. OSAA was replaced in June 2007 with the stand-alone Ministry of Aboriginal Affairs in recognition of the importance of the province's relationship with Aboriginal people in Ontario.

[201] In spite of Ontario's stated approach to deal with First Nations people by way of a collaborative and coordinated effort, the province virtually ignored this policy on the issue of jury creation. Moreover, during this entire process Ontario viewed the requests for lists from First Nations as being made to First Nations governments. That is, as Ms. Bristo agreed in her cross-examination, Ontario "has a government-to-government relationship with First Nations" (at 171). A potential vehicle for a coordinated and cohesive response existed in ONAS/OSAA. However, despite the recognition that First Nations have existing governments, the province left a lower-level bureaucrat – who was neither trained in her duties nor on the reality of First Nations' relations with Ontario – to facilitate the bulk of the efforts in approaching the Chiefs of First Nations for updated band lists, inconsistent with the status of First Nations as governments.

[202] I would note that a Chief is the head of his or her First Nation government in much the same manner that a mayor is the head of his or her municipal government. In my view, MAG's delegation of its responsibilities to area CSD workers on this critical problem was not a reasonable approach. The question could be asked: if 46 municipalities in a given judicial district were showing the

same critical results as First Nations reserves were in this case, would Ontario have gone about resolving the problem through the sole efforts of a junior bureaucrat?

[203] In other contexts, important issues of collective concern have been dealt with through tripartite (involving the federal and provincial governments and First Nations) or bilateral consultation and negotiations with Chiefs through the First Nations' respective political organization, which in this case was NAN. This is consistent with the special relationship between First Nations in Canada and the Crown. This type of process was completely ignored in this case, until the jury representation issue came to light in 2007.

[204] Finally, I would add, in response to evidence that efforts made since the extent of this issue first became public in 2008 have made little substantive difference in the situation, that the Iacobucci Report sheds some light on the nature of efforts that are likely to have an impact. This fresh evidence suggests very clearly that the type of bilateral or tripartite, state-to-state engagement is the most likely way to gain the participation of First Nations persons in the jury system. As the report explains, at 6:

> First Nations leaders unequivocally asserted that the way forward with respect to enhancing a relationship with the Ministry of the Attorney General in the context of the jury system, and all justice matters, is through a government-to-government relationship and a process that reflects such a relationship. First Nations seek

> greater control of the justice system as it applies to their people and view the re-integration of restorative justice programs as one measure to achieve this goal. The need for a collaborative approach to develop a proper jury roll process for First Nations peoples on reserve is viewed as a necessary step forward in a respectful relationship. Moreover, partnering with First Nations with respect to educational initiatives aimed at First Nations and government officials would contribute to improving the relationship.

CONCLUSION ON REASONABLENESS OF THE STATE'S EFFORTS

[205] To be *Charter*-compliant, the state's process for preparing the jury roll must bring the possibility that the distinctive perspectives of Aboriginal on-reserve residents will be included in the petit jury. Under the test established herein, the state must have made reasonable efforts, considering all the circumstances known to it, to fulfill its obligation such that Aboriginal on-reserve residents were given a fair opportunity to have their distinctive perspectives included in the jury roll.

[206] Having chosen a regime that necessarily requires recurrent efforts to achieve a comparable inclusion of on-reserve residents in the jury roll as off-reserve ones, it was incumbent on the state to undertake those efforts diligently, with ingenuity, and in keeping with the special relationship between the Crown and Aboriginal people. The state was obliged to do more than to rely on the efforts of a sole individual in a local court office.

[207] The discussion above discloses that the quality of effort, especially given the nature and extent of the problem, was sorely lacking for several reasons.

[208] First, while the precise outcomes of the state's efforts as they might have arisen since 2000 were not known to Kenora District staff until 2007, because the PJC before then had not sent them the response statistics, the PJC had access to the raw data itself and Kenora District staff were aware of the general concern over response rates. Thus, the extent of the low response rates – which were less than half that of non-Aboriginal off-reserve residents in 1993 and appear to have been decreasing each year since – were known to Ontario. Despite that, the causes were never investigated so that different modalities of engagement could be undertaken. This is despite the fact that the Ministry acknowledged that it was aware of the problem of low rates among First Nations populations, at least at a general level, earlier. The state, therefore, considered engaging in new and more creative efforts, as required, too late.

[209] In this case, the numerous frailties in the source lists for s. 6(8) purposes from which the 2008 Kenora jury roll was compiled ensured that the array could not be fairly chosen. Given what the state knew and ought to have known about the problem, the validity of its claim to reasonable efforts in the circumstances is undermined. The integrity of the process was fundamentally compromised by the inattention paid by the state to a known and worsening problem, year after year.

[210] Second, the state's actions show that it almost entirely failed to inform its approach with an understanding of its special relationship with Aboriginal people and the responsibilities entailed thereby. There is no evidence that the state took into account the critical estrangement of Aboriginal persons from the criminal justice system and the administration of justice in the post-*Gladue* context in its approach to the jury representation problem.

[211] In the end, I have considered such things as what the state did and did not do, what it knew before engaging in efforts, what it learned about the efficacy of those efforts, and any resulting effects. In this case, what the state knew or ought to have known was considerable; what the state did in response was very little.

[212] As a result, the ultimate question of whether, in all the circumstances, the state made reasonable efforts to compile source lists for the preparation of the 2008 jury roll in Kenora must be answered in the negative.

[213] I will now turn to and briefly address the remaining issues that were advanced by the appellant and the interveners.

The Partiality Issue: s. 629 of the *Criminal Code*

[214] Here the appellant argues that, in any event, what the state did in preparing the jury roll constitutes partiality, fraud or wilful misconduct under s. 629(1) of the *Criminal Code*. Because of my conclusion that the appellant has shown a breach

of ss. 11(d) and (f) of the *Charter* and a breach of s. 6(8) of the Act, an analysis of this issue is unnecessary.

The Equality Issue: s. 15 of the *Charter*

[215] For the same reason, I need not deal with the s. 15 issue. However, since it was fully argued, I will do so briefly.

[216] The appellant, supported by the intervener, the David Asper Centre for Constitutional Rights, argues that the exclusion from jury rolls of Aboriginal on-reserve residents (or at least their under-inclusion) violates s. 15 of the *Charter*. They argue that this violates the appellant's personal equality rights. They also argue that it constitutes a violation of the s. 15 rights of Aboriginal on-reserve residents as potential jurors.

[217] There is no dispute that this requires the appellant to show that the state's actions created a distinction based on an enumerated or analogous ground that imposes a disadvantage by perpetuating prejudice or stereotyping. There is also little dispute, and I accept, that Aboriginal on-reserve residence is an analogous ground.

[218] In addressing his personal equality rights, the appellant argues that the state's actions significantly diminished the likelihood of Aboriginal persons appearing on the jury panel of the appellant, thereby "exacerbating [his] existing disadvantage". The nature of that disadvantage is not articulated, nor is there

anything in the record that suggests what that might be. There can be no doubt about the general systemic discrimination suffered by Aboriginal people in the criminal justice system. However, without evidence, I cannot conclude that this appellant suffered disadvantage because of the make-up of his petit jury or of the jury roll from which it was derived.

[219] The appellant also argues that his personal equality rights are violated because he is an Aboriginal on-reserve resident and the state's actions mean he has less chance of being tried by a jury including Aboriginal on-reserve residents than off-reserve accused do of being tried by a jury including off-reserve residents. I would offer the same answer to this argument: there is nothing in the record to suggest that this constitutes a disadvantage. Nor does the appellant suggest any.

[220] The appellant further argues that the state's actions significantly diminish the opportunity of Aboriginal on-reserve residents to serve on a jury thereby exacerbating their disadvantage and alienation from the criminal justice system. He says that he should be granted public interest standing to raise this issue.

[221] Given my conclusions above, I leave for another day whether, if the state's actions in seeking to include Aboriginal on-reserve residents in the preparation of the jury roll met its representativeness obligation, those actions could nonetheless constitute a distinction for s. 15 purposes.

[222] It is not necessary to address that issue because I would not accord the appellant public interest standing in this case. The appellant seeks a new trial. His interest is in personal remedies under s. 24(1) of the *Charter*. A public interest claim is not a personal one. It typically seeks declaratory relief under s. 52(1) of the *Charter*. It is hard to see that this appellant has any such interest. Moreover, the appellant has offered no reason why prospective jurors could not reasonably and effectively challenge the state's actions. Rather, it appears that the appellant's position is premised on his challenge to his conviction serving as a sufficiently important reason to challenge the state's actions. In my view, that is not enough to accord him public interest standing.

[223] In summary, I find that the appellant has not made out a violation of his equality rights. I would therefore dismiss this issue.

REMEDY

[224] Having concluded that there was a violation of the appellant's constitutional rights under ss. 11(d) and (f) of the *Charter*, I now turn to the appropriate remedy for that violation.

[225] The appellant, supported by the interveners the Bushie and Pierre families and NAN, argues that this court should set aside his conviction for manslaughter and order a new trial.

[226] The respondent argues, and I accept, that a new trial is only an appropriate remedy under s. 24(1) if the appellant can establish (a) actual partiality or prejudice in the trial, (b) a reasonable apprehension of partiality or bias, or (c) the appearance of unfairness such that public confidence in the integrity of the justice system would be undermined. The respondent points out that this court has already held, at 2011 ONCA 536, that the appellant's trial was not unfair. There is also no support in the circumstances of this case for a reasonable apprehension of partiality or bias.

[227] However, the *Charter* violation – of the appellant's right to representativeness of the jury roll – necessarily undermines public confidence in the integrity of the justice system and the administration of justice. As I have discussed above, Rosenberg J.A. in *Scientology* described the twin purposes of representativeness as being impartiality *and* public confidence in the criminal justice system. It follows that the state's failure to meet its constitutional obligation of representativeness necessarily diminishes public confidence in that system.

[228] In my view a declaration could not restore public confidence in the criminal justice system going forward, nor could it restore public confidence that justice was done in the appellant's case. The only effective remedy is to order a new trial.

[229] The respondent emphasizes that the appellant's trial counsel failed to raise the representativeness issue at trial, and argues that this failure precludes a new trial or is at least "a very strong indicator that it did not affect the fairness of the trial or public confidence in the integrity of the justice system."

[230] However, this submission misses the mark. As I have discussed above, the violation of the right to representativeness in this case is not the low representation of Aboriginal on-reserve residents on the jury panel per se. The violation is the state's failure to provide Aboriginal on-reserve residents with a fair opportunity to be included in the jury roll. A disproportionately low number of Aboriginal on-reserve residents on a jury panel is not, in itself, necessarily evidence that there were significant deficiencies in the process by which the roll was created. Trial counsel's assumption, as stated in his cross-examination, that the state was complying with its obligations, was a reasonable one. It is the detailed record assembled for the first time that demonstrates the state's failure.

[231] Moreover, it is for the court, not for counsel, to determine and remedy the damage to public confidence in the criminal justice system.

[232] For these reasons, I would grant the application to introduce fresh evidence, allow the appeal, and order a new trial. I am confident that the Crown will appropriately exercise its discretion whether to proceed with a new trial,

having regard to all the circumstances of the case, including the time the appellant has spent in custody.

“H.S. LaForme J.A.”

Goudge J.A. (Concurring):

[233] I have had the benefit of reading the reasons for judgment of my colleague LaForme J.A. I agree with his conclusion that in all the circumstances of this case the appeal must be allowed and a new trial ordered because the appellant was denied the right to the representative jury roll that is guaranteed to him by the *Canadian Charter of Rights and Freedoms*.

[234] While I agree entirely with my colleague's analysis of the law of representativeness in paras. 1-51 of his reasons, in applying that law to the circumstances here I reach the same conclusion that he does, but for reasons that differ somewhat from his. In addition, I fully concur with his analysis and disposition of the issues concerning s. 629(1) of the *Criminal Code*, s. 15 of the *Charter*, and remedy.

[235] Before turning to the circumstances of this case that I think deserve special emphasis, it is helpful to highlight several aspects of the legal test explained by my colleague.

[236] First, it is clear that the constitutional right of an individual to be tried by a jury selected from a properly representative jury roll is mirrored by the corresponding constitutional obligation of the state. When I describe the state's obligation, I am also describing the appellant's right.

[237] Second, the state in this case is Ontario. While the statutory obligation under s. 6(8) of the Act rests on the sheriff, the constitutional obligation rests on Ontario. Ontario's central agencies are most relevant here because of their capacity to address its constitutional obligations. I refer particularly to the Court Services Division (CSD), the Provincial Jury Centre (PJC) and the CSD's local Kenora District presence, Ms. Laura Loohuizen. Also important however are Ontario's agencies dealing with its Aboriginal citizens, particularly the Native Affairs Secretariat, which later became the Ministry of Aboriginal Affairs.

[238] Third, the state's obligation extends beyond compiling the lists and sending out the jury service notices. It includes facilitating their delivery and encouraging the responses to them.

[239] Fourth, the state's obligation is a continuing one. Year over year, it is an obligation that the state must ensure it is discharging.

[240] Fifth, the state's obligation is to make reasonable efforts to provide Aboriginal on-reserve residents with a fair opportunity to have their perspectives included in the jury roll. This must be distinguished from additional steps that might be taken in pursuit of best social policy. The constitutional imperative does not require perfection of the state.

[241] Sixth, assessing the state's preparation of the 2008 jury roll for the Kenora District against the constitutional standard requires a consideration of all relevant circumstances. Several deserve highlighting:

1. Recent history is one such circumstance. The ongoing nature of the state's constitutional obligation makes its prior treatment of that obligation relevant in assessing its efforts in the year in question. Past neglect cannot be ignored in determining what is currently required of the state.

2. I agree with my colleague that the state's special relationship with Aboriginal people is also relevant. While the constitutional right to representativeness is the appellant's, it requires the state to provide Aboriginal on-reserve residents with their fair opportunity to be included in the jury roll. The state has chosen to discharge its obligation by a statutory mechanism that addresses Aboriginal on-reserve residents discretely. In my view, the state's interaction with Aboriginal people that this necessitates engages the honour of the Crown and is a factor informing what is constitutionally required of the state.

3. I also agree that the fundamental estrangement of Aboriginal people from the justice system is a relevant consideration. That is particularly true in the Kenora District where Ms. Loohuizen indicated that on average, 54% of the jury trials involve Aboriginal people as complainant, accused or both. The

> need to address this estrangement simply enhances the importance of the state's efforts to provide Aboriginal on-reserve residents with the opportunity to be included in the annual jury roll.

[242] The facts to which these legal principles are to be applied are comprehensively described by my colleague. I propose only to provide emphasis to those that, in my view, graphically highlight the challenge posed for the state's representativeness obligation in preparing the 2008 Kenora jury roll.

[243] There can be little doubt that for a number of years before 2008, the underrepresentation of Aboriginal on-reserve residents in the jury system in the Kenora District was a well-known problem. Several things made that obvious:

1. Because of the process used, the PJC knew each year how many questionnaires were sent to Aboriginal on-reserve residents, how many responses were returned from those who received them, and how many of those were eligible for inclusion in the jury roll. The PJC also had the comparable numbers for the province as a whole. The very low eligible response rate for Aboriginal on-reserve residents clearly compared poorly with the same numbers province-wide.

2. The underrepresentation of Aboriginal people in the jury process was the subject of a well-known court proceeding in Kenora as far back as 1993.

3. The letter sent with the questionnaires to Aboriginal on-reserve residents each year since at least 2001 reflected the concern with this underrepresentation: “We are trying to involve more First Nation Members in jury duty so we can have the benefit of their wisdom.”

4. In 2004, a representative of the PJC met with local Kenora officials and Justice Stach to discuss ways to improve the inclusion of Aboriginal on-reserve residents in the jury process, beginning with the jury roll.

5. In December 2006, Ms. Loohuizen reviewed the 2007 jury roll and estimated that only about 6.59% were Aboriginal, far less than their one-third share of the population of the district.

6. By the spring of 2008 in Kenora, this underrepresentation of Aboriginal on-reserve residents could come as no surprise to any justice participant working in the District of Kenora, as the Crown concedes in its factum.

[244] It is also useful to highlight the facts surrounding the state’s compilation of lists of Aboriginal on-reserve residents, its role in facilitating delivery of the questionnaires and in encouraging responses.

[245] My colleague has dealt thoroughly with the lists used to source the Aboriginal on-reserve residents who were sent jury service notices in the fall of 2007 for the 2008 jury roll. I need only highlight that the great majority of those lists were dated, did not take account of those who turned 18 or died after 2000,

or those who moved on or off reserve after 2000, and omitted several small reserves altogether.

[246] The questionnaires were mailed to Aboriginal on-reserve residents by delivery to the intended recipient at “General Delivery”, to be picked up by the recipient at the reserve post office.[23] Questionnaires not claimed within 30 days were returned to the sender. The record is sparse concerning the precise proportion of questionnaires that were unclaimed and returned (the “Returned by post office” or “RPO” rate) or how this compared with the rate for the province as a whole. Two examples that are available suggest that this problem was significantly greater for on-reserve residents than for those off reserve. In 2001 for the 2002 jury roll, 10.6% of the questionnaires sent to the reserves were returned as undeliverable. The province-wide off-reserve rate for that year was 6.2%. In 2006 for the 2007 jury roll, the comparable figures were 16.9% and 6.0%. In other words, it seems clear that there was a delivery problem for on-reserve questionnaires in compiling the annual jury roll in the Kenora District.

[247] It was also clear that there was an ongoing significant problem with the response rate from those Aboriginal on-reserve residents who received the questionnaires, compared to off-reserve residents. The PJC practice of sending out questionnaires and receiving the responses made that evident to the PJC

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[23] The only exception was that questionnaires for one reserve were sent to the band’s address, a rural route in Kenora since 2007.

every year. As the acting director of the corporate planning branch of CSD agreed in cross-examination, lower on-reserve response rates "have been a historical issue for the Ministry of the Attorney General." There are many demonstrations of this in the record.

[248] In 1994, Stach J. in *A.F.* set out the troubling comparison between Aboriginal on-reserve return rates (33%) and off-reserve returns (60 to 70%). Historical records of the PJC for eligible returns show an even more troubling comparison (13.3% compared to 62%) for the 2002 jury roll. In the 2003 preparation for the 2004 jury roll, the PJC again signalled the fact of "very few Native returns" to the local Kenora officials. The results from that year were equally concerning – a 9% success rate for Aboriginal on-reserve residents compared to a 50% eligible return rate for those off reserve. The PJC records for the 2006 jury roll show the same kind of comparison (9.9% compared to 53.1%). The Kenora officials were advised in detail by the PJC of the results of the mailing for the 2007 jury roll. They are even more graphic, showing 7.6% eligible on-reserve responses compared to 55.7% for off-reserve. This is despite the fact that the number of questionnaires sent to Aboriginal on-reserve residents was increased, as Ms. Loohuizen said, "to help offset previously low response rates from on-reserve recipients of the questionnaire in prior years."

[249] By 2008 therefore, the comparatively low rate of return from Aboriginal on-reserve residents had been well-known by the state for a number of years as a

significant contributing cause of the underrepresentation of Aboriginal on-reserve residents on the annual jury roll for the Kenora District.

[250] In summary, the jury roll at issue in this case was prepared in the context of ongoing serious problems with three steps of the process. First, the lists of Aboriginal on-reserve residents from which recipients were selected were flawed. Second, the delivery of questionnaires to them was significantly impaired by a "Returned by post office" rate considerably higher than for off-reserve residents. Third, the response rate for those on reserve receiving the questionnaires was much lower than for their off-reserve counterparts. The state clearly had a role to play in each of these steps. How it responded to these challenges must be assessed against its constitutional obligation.

[251] As my colleague has described, Ontario's response was left very largely to Ms. Loohuizen, the person in Kenora responsible for the inclusion of Aboriginal on-reserve residents in the jury process. That was true for the preparation of the 2008 jury roll as it had been for the previous six years. I agree that, over that time, she did the very best she could within the limits of her relatively junior position, and the very limited training she had received. She is to be commended for this. However, the question is not her dedication but whether the state made the reasonable efforts required of it by its constitutional obligation.

[252] The first challenge for the state, to which the appellant directed much argument, was that presented by the band lists. My colleague has described their frailties in detail. He has also described the steps undertaken by Ms. Loohuizen to try to get up to date lists from the bands directly, to replace the dated band lists provided by INAC up to 2000. Obtaining current band lists was the primary focus of her efforts to seek to include Aboriginal on-reserve residents in 2008 jury roll process, as it had been in the several years before that. As is described by my colleague, she met with only limited success.

[253] My assessment of her efforts to address the challenge presented by the band lists differs from that of my colleague LaForme J.A. In my view, these efforts should be assessed in the context of the potential impact of the challenge presented by these lists to the objective, namely to provide a fair opportunity for the distinctive perspectives of Aboriginal on-reserve residents to be included in the jury roll.

[254] The major difficulty with the lists was that the 32 INAC band lists were seven years old. The other 10 band lists she used were relatively current. However, even the 32 INAC lists retained very considerable utility for representativeness purposes. Except for Aboriginal on-reserve residents who died or left after 2000 (whose numbers are unknown on this record), the INAC lists remained an accurate source of names of those who continued to live on reserve in 2008. Absent problems with delivery and response rates, a properly

proportional selection of names from the INAC lists would still provide the distinctive perspectives of Aboriginal on-reserve residents that representativeness requires.

[255] It is true that the INAC band lists did not include those who moved onto the reserves or turned 18 after 2000. In addition, Ms. Loohuizen had no lists for 4 reserves. However, these omissions did not undermine the utility of the lists she did have, when looked at through the lens of what representativeness seeks to provide. Undoubtedly it would have been better, from the perspective of completeness, had Ms. Loohuizen succeeded in obtaining current lists for all of the bands in the Kenora District. However, for the reasons I have given I think this could have had only a marginal impact on the objective of representativeness.

[256] I would therefore conclude that the band lists presented only a quite modest challenge to the representativeness obligation of the state in preparing the 2008 jury roll. Moreover, to meet this challenge, Ms. Loohuizen in fact made a number of different efforts to acquire better lists, as my colleague has described.

[257] In the end, an assessment of Ms. Loohuizen's efforts on behalf of the state to meet the challenge for the jury roll process presented by the band lists requires consideration of these efforts in the context of the potential impact of the

lists on representativeness. A major challenge would require major efforts. However as I have said, I view that impact as modest. I would therefore conclude that, faced with this, her efforts were sufficient that, if this were the only challenge to the 2008 jury roll, I would not find that the state fell short of its constitutional obligation.

[258] The second challenge for the state argued by the appellant was the relative difficulty in getting the questionnaires into the hands of the intended Aboriginal on-reserve recipients, compared to off-reserve residents. For each group, the state would have known how many questionnaires were sent out and how many were returned as undeliverable. The record points to a markedly worse experience for Aboriginal on-reserve residents. It need hardly be said that since the on-reserve questionnaires were significantly less likely to be delivered, this significantly reduced the fair opportunity of Aboriginal on-reserve residents to have their perspectives included in the jury roll. The delivery problem therefore presented a challenge that the state had to address.

[259] Its constitutional obligation required it to make reasonable efforts to facilitate delivery of the questionnaires. While there may be many reasons that do not involve the state for questionnaires not reaching their intended recipients, there are clearly steps the state could have taken to make successful delivery more likely, beginning with a search for the cause or causes and what the state might do to assist.

[260] The difficulty here was the state's inattention to this challenge. It appears that virtually nothing was done over the years, including for the 2008 jury roll, to determine the cause or causes of the on-reserve delivery problem or what the state could do to alleviate it. Ms. Loohuizen, who was left to do the heavy lifting for the state, described in detail the efforts she went to from 2001 to 2008 to include Aboriginal on-reserve residents in the jury roll process. None addressed the delivery problem.

[261] The record shows that not until 2011 were any steps taken by the state to try to do what it could to reduce the disparity between on-reserve and off-reserve delivery rates. In that year, the state introduced new practices for reserves with high RPO rates, such as resending the questionnaires and contacting chiefs for assistance with deliveries. In his report, Mr. Iacobucci offers another suggestion: when a questionnaire is returned within 30 days as undelivered, another questionnaire is sent out to another on-reserve resident.

[262] It is not necessary to decide if these solutions to the delivery problem are constitutionally required. What can be said is that faced with this substantial challenge, which impaired the fair opportunity of Aboriginal on-reserve residents to have their perspectives included in the jury roll, inaction by the state in the face of action that it could have taken cannot meet the reasonable efforts standard required by the representativeness right of the appellant.

[263] The third challenge facing the state in preparing the 2008 jury roll and also argued by the appellant was the comparatively low rate of return from Aboriginal on-reserve residents to whom questionnaires were sent. The comparison with off-reserve return rates was stark. Off-reserve rates were typically four or five times higher than for on-reserve residents. For the reasons I have described, the state knew of this discrepancy for a number of years. Its impact on the underrepresentation of Aboriginal on-reserve residents on the annual jury roll is obvious. The magnitude of the difference in return rates meant a significantly reduced opportunity for inclusion of Aboriginal on-reserve residents in the jury roll relative to off-reserve residents.

[264] The state's response to this challenge was once again left very largely to Ms. Loohuizen, occasionally with the advice of her superior at the PJC and in later years with some assistance from Justice Stach.

[265] One obvious step for the state was apparently not taken. There is nothing in the record to suggest that from 2001 to 2007 Ms. Loohuizen or any other state representative made a concerted effort to determine from Aboriginal on-reserve leaders why the response rates were so comparatively low, or what the state might do to help.

[266] As with the delivery problem, there are undoubtedly many possible explanations for the comparatively low response rates from Aboriginal on-reserve

residents that have nothing to do with the state. The issue is what steps the state could reasonably have taken to address the problem. The state's representativeness obligation required it to make reasonable efforts to encourage those responses – efforts that constitute an essential part of its obligation to seek to provide those residents with a fair opportunity to have their distinctive perspectives included in the jury roll.

[267] Starting with the work in 2003 for the 2004 jury roll, Ms. Loohuizen and the PJC began to implement the one step that they thought would alleviate the problem. The PJC increased the number of questionnaires sent to Aboriginal on-reserve residents.

[268] The next year Ms. Loohuizen added a further increase, beyond the number called for by the Aboriginal on-reserve share of the district's population, to, as she said, "help in a small way to offset our poor response rate." That was followed by a smaller increase the following year and a more substantial one the year after (in 2006 for the 2007 jury roll) to help offset previously low response rates from on-reserve residents. The results of the mailing in 2006, which starkly highlighted the low response rate challenge, led her, on Justice Stach's advice, to increase substantially the number of questionnaires sent to Aboriginal on-reserve residents the next year. This was part of the preparation for the 2008 jury roll, the one at stake in this case.

[269] It is thus apparent that over the years, the state's focus was on increasing the number of questionnaires sent to Aboriginal on-reserve residents beyond their share of the population as the way to address the low response rate problem. What is also striking however, is how unsuccessful this was, right from the beginning. For the 2002 jury roll, before Ms. Loohuizen began this effort, a total of 57 responses were received. This figure was 44 in the 2006 jury roll year, 52 in 2007, and 60 in 2008. For the 2008 jury roll, the number of Aboriginal on-reserve questionnaires was increased from 484 to 600, an increase of 116. It resulted in only 8 more responses than the year before – and only 3 more than the 57 that had been received in 2002 when 360 questionnaires were sent out.

[270] The failure of this approach to successfully address the low response rate challenge was therefore apparent from early on. Yet it was continued, up to and including the year in question in this case.

[271] It is true that over this period of time, several other steps were taken that might possibly have assisted with this problem in a minor way. None were, however, undertaken with that objective and the results demonstrate that none helped. The plain English and syllabics covering letters sent with each questionnaire had always said that expenses would be paid for jury service. Questionnaire recipients who had inquiries could seek assistance from Ms. Loohuizen's office in Kenora. In the summer of 2007 Ms. Loohuizen visited a number of reserves to discuss jury representativeness issues. However, her

major objective appears to have been to acquire updated band lists. Indeed, given her junior position, it would have been too much to expect an in-depth discussion with band leaders about the cause or causes of low response rates or what the state could reasonably do to address them.

[272] Mr. Iacobucci's report offers some considerable insight into what those discussions might have yielded had they taken place. He described a number of reasons contributing to the low response rates that were identified by Aboriginal leaders. He leaves no doubt that the problem is complex. He concludes that it reflects broader issues like the dissonance between traditional Aboriginal approaches to conflict resolution and the approaches of the Canadian justice system, the historic discrimination in that system experienced by Aboriginal peoples, and their lack of understanding of the system.

[273] However, Mr. Iacobucci's report offers several ways that the state could address the problem. A clear prerequisite is discussion between Aboriginal leaders and senior Ontario officials. People in junior positions such as Ms. Loohuizen should not be expected to shoulder that burden. He also offers specific solutions such as a more comprehensive justice education program for Aboriginal people, a revised questionnaire to make it simpler and free of wording perceived by the recipients as threatening, and a change in practice so that if a questionnaire is not returned, another questionnaire is dispatched to another on-reserve resident.

[274] I need not determine whether any of these proposals are constitutionally required. They simply demonstrate that there are and were things the state could do to alleviate the problem, had it investigated.

[275] It is sufficient to repeat that the state left the serious challenge of low response rates with a junior employee. Through her, the state response, repeated year after year up to and including the 2008 jury roll can only be described as a failure. No attempts to engage with Aboriginal leaders appear to have been undertaken to determine the causes of prior response rates or what other ameliorative efforts might be undertaken by the state to encourage responses.

[276] I do not think that a failed response, coupled with a failure to explore other steps the state might have taken to help, can be said to constitute the reasonable efforts required of the state to address this problem and do what it reasonably could to provide Aboriginal on-reserve residents with a fair opportunity to have their distinctive perspectives included in the 2008 jury roll. The challenge of low response rates was serious. It required more from the state.

[277] In summary, I would conclude that because of the state's failure to make reasonable efforts to facilitate delivery of questionnaires to Aboriginal on-reserve residents and to encourage responses to them, Ontario failed to meet its

constitutional obligation to the appellant in the preparation of the 2008 jury roll in the District of Kenora.

“S.T. Goudge J.A.”

Rouleau J.A. (Dissenting):

A. INTRODUCTION

[278] I have had the benefit of reading the reasons of both of my colleagues. Although I reach a different conclusion than they do, there is much in their reasons with which I agree. Specifically, I agree with LaForme J.A.'s analysis of the law of representativeness in paras. 1 to 51 of his reasons and with his analysis of s. 15 of the *Canadian Charter of Rights and Freedoms*. I also agree with his conclusion that the government has a special relationship with Aboriginal people.

[279] However, as I will explain, I disagree with the majority's application of the law to the facts of this case. I have concluded that the respondent was not in breach of its constitutional obligations and I would dismiss the appeal.

B. OVERVIEW

[280] In theory, the creation of a jury roll is a simple process governed by the *Juries Act*, R.S.O. 1990, c. J.3. In practice, however, this process can be fraught with difficulties ungoverned by the legislation. Many such difficulties arose during the creation of the 2008 Kenora jury roll. The issue in this case is whether the government's response to those problems was reasonable.

[281] What is clear from my colleagues' analyses and from the review conducted by Mr. Iacobucci (the "Iacobucci Report") is that Aboriginal people who reside on reserves are seriously underrepresented on jury rolls produced in the district of Kenora. Together, my colleagues LaForme J.A. and Goudge J.A. identify three main causes of this underrepresentation: the lists being used to send jury questionnaires are unreliable; there are problems with the delivery of the questionnaires; and, most importantly, the response rate of on-reserve residents to the questionnaires is extremely low. It is equally clear that the problem has been growing for several years, and the government's efforts to increase the representation of on-reserve residents on the jury roll have been unsuccessful.

[282] As I will explain below, up to and beyond 2007, the government did not know the full complexity of the problem: they thought the decline being observed in the representation of Aboriginal on-reserve residents on the jury roll was largely due to the difficulty they experienced in securing accurate, up-to-date lists of on-reserve residents. The appellant in this case also identified the list issue as the primary failing of the government, and both parties focused their arguments and fresh evidence on this point. Ultimately, I find that the government deployed reasonable efforts to obtain better lists; and, to the extent that those efforts were unsuccessful, reasonable steps were taken to ensure that on-reserve residents were still provided with the opportunity to contribute their distinctive perspective

to the jury process, despite the deteriorating quality of the lists. This opportunity was provided by increasing the number of jury notices sent to on-reserve residents beyond what their proportionate numbers would have otherwise dictated, which reasonably compensated for the inaccuracies in the lists being used.

[283] I find that the delivery issue identified by Goudge J.A. is largely a symptom of the inaccuracy of the lists. The government adequately addressed it through the aforementioned increase in the number of questionnaires sent.

[284] The government was still struggling to better understand the complex problem of low and declining return rates in 2007-2008. It would take considerably more time and study if it was to be effectively addressed. With the benefit of the Iacobucci Report, we now know considerably more than was known then. It shows that the problem is extremely complicated: First Nations individuals feel alienated from the justice system and it is this sense of alienation that is at the root of their unwillingness to participate in the jury process. Importantly, the Iacobucci Report explains that there are no easy solutions. Several of its recommendations involve costs and would necessitate important policy and legislative changes, changes that ought not to be undertaken without considered study. Governments must be accorded time and leeway to react appropriately and effectively to emerging social, political, or economic conditions. Given what the government knew in 2007, and the sheer complexity of the

problem, its efforts to address the low and declining response rates were reasonable in the circumstances.

[285] In responding to a problem such as the one posed by declining response rates, the government has many options. It is not clear, however, where constitutional requirement ends and where good policy begins. Mobilizing government resources to encourage higher response rates from on-reserve residents is certainly good policy. Which, if any, of the recommendations made in the Iacobucci Report are constitutionally required is not for this court to decide. What is constitutionally required is that the government make reasonable efforts to give on-reserve residents a fair opportunity to bring their distinctive perspective to the jury process. Given what they knew at the time, the steps they took to address the problems of which they reasonably could have been aware, and the deference due to the governmental process, I find that the government discharged its burden in this case.

C. ANALYSIS

[286] I turn now to an analysis of the issues raised in this appeal.

(1) Defining the Problem

[287] A challenge we face in assessing whether the government's efforts were reasonable in this case is that there were (and are) two distinct, but related problems hindering on-reserve residents' participation in the Kenora jury process.

The first problem was that once the federal government stopped giving the province INAC lists, Ms. Laura Loohuizen had difficulty obtaining up-to-date lists of the residents of First Nation reserves in the Kenora district. This problem worsened each year as the INAC lists grew increasingly out of date.

[288] The second problem was that fewer and fewer on-reserve residents were responding to jury questionnaires, and more and more of those who did respond were ineligible for jury duty. As shown by my colleagues, the gap between response rates from on-reserve residents and off-reserve residents widened significantly from the early 1990s to 2007. As I will explain however, up until quite recently, this deterioration in response rates was believed to be largely caused by the lists problem. In 2007, with the statistics relating to response rates in hand, the government would have become aware that the problem was more significant and more complex than previously thought and that – if a marked improvement in response rates was to be achieved – any solution would have to involve more than simply pursuing better lists. The Iacobucci Report has now made it apparent that although securing better lists will be an important first step towards increasing the representation of on-reserve residents on the jury roll, it will have but a limited ultimate impact on resolving the problem of low response rates.

[289] I will first deal with the lists issue and then turn to the broader concern of the declining response rate from on-reserve residents.

(2) The Lists Problem

[290] Reasonable efforts to secure accurate lists are a statutory requirement under the *Juries Act* and a component of the government's *Charter* obligation to provide on-reserve residents with a fair opportunity to have their distinct perspective included on the jury roll. Despite the massive amount of fresh evidence filed, the exact impact of the various errors made by the government, both in collecting the band lists and in the use they made of those lists to create the jury roll, cannot be precisely known. As explained by my colleague Goudge J.A., however, the challenge to the representativeness of the jury roll presented by the band lists was quite modest. I agree with his conclusion that the government did not breach its constitutional obligation to make reasonable efforts to compile a representative jury roll by using the out-of-date INAC lists, by lacking lists for four reserves entirely, or by using post-*Corbiere* band lists, especially when assessed in light of what the principle of jury representativeness seeks to provide. I will give detailed reasons for my conclusion.

[291] Before turning to my analysis, however, I think it is important to relate certain additional facts drawn from the record.

(a) Some Facts

[292] LaForme J.A. correctly notes that the on-reserve population of Kenora makes up an estimated 30.2% to 36.8% of the total population of that district.

However, for the purposes of developing a jury roll, only those aged 18 years or older are relevant, because a person must be 18 to be eligible for jury duty. The on-reserve *adult* population actually makes up 21.5% to 31.8% of the total adult population of Kenora, which is a significantly lower proportion than that expressed by my colleague.

[293] In 2008, the number of jury notices sent to on-reserve residents was disproportionately high in comparison to off-reserve residents, which favoured their representation on the jury roll. This is because of the way Ms. Loohuizen conducted her calculations for the purposes of s. 6(8) of the *Juries Act*. In determining how many jury notices to send out to the on-reserve population for the 2003 to 2008 Kenora jury rolls, Ms. Loohuizen used the 1996 census figures for off-reserve residents who were 18 or older,[24] but she counted by hand the number of on-reserve residents who were 18 or older on the most recent band lists she received. As a result, for her calculations for the 2008 roll, her on-reserve adult figure would have partially reflected any population growth in that demographic since 1996. By contrast, the number of off-reserve adult residents remained static at its 1996 level. This favoured greater representation by on-reserve residents on the jury roll because it caused a disproportionately high number of jury notices to be sent to on-reserve residents in comparison to off-

[24] The district of Kenora continued to use the 1996 census for the purposes of its jury roll until 2009.

reserve residents. This effect may have been magnified because, as compared to the off-reserve population of the district, the on-reserve populations were disproportionately young. This is reflected in the appellant's population estimates, which show that the proportion of the 18-and-over population of Kenora District living on-reserve increased from between 17.1% and 30.6% in 2001 to between 21.5% and 31.8% in 2006.

[294] In numerical terms, Ms. Loohuizen's use of the manually-updated numbers generated a requirement that 403 questionnaires be sent to on-reserve residents. Had she not updated the on-reserve figure and instead used the 1996 census figures for both on- and off-reserve populations, the requirement would have been to send only 334 questionnaires to on-reserve recipients.[25]

[295] Once Ms. Loohuizen and Justice Stach became aware of the low rate of return of questionnaires by on-reserve residents, they further increased the number of questionnaires sent to them to 600. This represents an increase of 266 questionnaires over the number required by the 1996 census figures (which was 334). It represents an increase of 197 questionnaires over the number required by Ms. Loohuizen's manually-adjusted figure (which was 403).

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[25] The appellant provides this figure at footnote 278 of his factum. Because it is calculated using 1996 census data, which excludes some incompletely enumerated reserves, 334 may understate the appropriate number of questionnaires.

[296] It is also important to note that the list used to send off-reserve questionnaires is produced by MPAC. However, that list is only updated every three years, and its addresses will therefore regularly be out of date to some extent as well.

[297] With these background facts in mind, I will now turn to assessing how each of the problems with the lists used by Ms. Loohuizen impacted the principle of the representativeness of the jury roll.

(b) The Outdated Lists

[298] I acknowledge that the use of the outdated INAC lists from 2000 directly impacted the opportunity of on-reserve residents to be selected for jury duty: on-reserve residents listed there who had died or moved off of the reserve after the lists were prepared may have been sent questionnaires which they would not have received. The fresh evidence shows that, during the relevant period, the number of questionnaires returned by the post office as ‘not delivered’ increased – a clear indication that the problem did exist and was worsening. However, as shown by the facts outlined above, the increase in the number of jury notices sent to on-reserve residents likely compensated for the inaccuracy of the lists, such that the perspective of on-reserve Aboriginal people was given a fair opportunity to be included on the jury roll.

(c) The Missing Lists for Four Reserves

[299] Some of the list-related errors made by the government had little or no impact on whether the perspective of on-reserve residents was reasonably made available for inclusion on the jury roll. For example, the failure to identify three reserves as being located in the Kenora district, and the failure to obtain a list from a fourth reserve, means that residents of those reserves did not receive jury notices.[26] However, the number of questionnaires sent to those reserves for which lists were available was increased well above the number that, proportionately, on-reserve residents should have received. In the result, the questionnaires received by the 42 reserves for which lists were available would likely have compensated for the four that received no questionnaires.

(d) The Effect of *Corbiere*

[300] The impact of still other errors or inaccuracies was equally minimal. An example is the government's failure to recognize the practical effect of the Supreme Court of Canada's decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203. As explained by my colleague

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[26] The three were Kashechewan, Marten Falls, and Koocheching, and the fourth was Neskantaga/Lansdowne House. While both Kashechewan and Marten Falls were overlooked due to a misunderstanding of the Kenora District's boundaries, CSD staff in Thunder Bay had been including Marten Falls within Thunder Bay District and had a corresponding 2000 INAC list for that reserve. The record demonstrates that although Ms. Loohuizen was unaware until 2007 that Koocheching had separated from Sandy Lake, she believed that its population may have been captured in Sandy Lake's 2000 INAC list. It is not clear from the record that this belief was incorrect. She also included Saugeen First Nation, although it is not located within Kenora District.

LaForme J.A., this error meant that some of the lists being used by Ms. Loohuizen included band members who were not resident on the reserves. The effect of this overinclusiveness was twofold. On the one hand, it artificially inflated the number of on-reserve residents, as calculated by Ms. Loohuizen, thereby increasing the number of questionnaires to be sent to on-reserve residents beyond what it would have been otherwise. On the other hand, some questionnaires directed to on-reserve residents were sent to off-reserve residents who likely did not receive them. The net impact, however, was likely negligible: statistically speaking, the number of misdirected questionnaires ought to roughly equal the number of additional questionnaires sent because of the larger list of residents.

(e) The Government's Response to the Lists Problem Was Reasonable

[301] The government can properly be faulted for some of the failures described above. The standard is not one of perfection, however, and the issue for this court to decide is whether the government deployed reasonable efforts in response to problems of which it was or ought reasonably to have been aware. The government knew about the problems with the INAC lists. It responded in two ways: it tried to obtain new lists, and it tried to compensate for the fact that it was using older lists in the meantime.

[302] LaForme J.A.'s reasons, at paras. 101 to 107, outline some efforts the government deployed to obtain accurate, up-to-date lists to replace the INAC lists. He finds fault, however, in these efforts. I agree that the response was limited in the early years. This, however, was understandable. That the lists were one or two years old is insignificant, given that the MPAC information is only updated every three years. Also, when Ms. Loohuizen sent letters to the chiefs in 2002, she likely expected that lists would be provided shortly thereafter in response to this request. Clearly, when no lists were forthcoming, more needed to be done. This led to the further efforts outlined in LaForme J.A.'s reasons and to the greater involvement not only of Ms. Loohuizen, but also of Ms. Peacock and Justice Stach. In 2007, Ms. Loohuizen alerted the Assistant Deputy Minister to the problem. The government then considered whether policy and legislative changes would be required, and later appointed Mr. Iacobucci.

[303] This case is not like *R. v. Nahdee* (1993), 26 C.R. (4th) 109 (Ont. C.J. (Gen. Div.)), where the Court found that the government failed in its obligation to obtain lists of on-reserve residents from which to compile the jury roll. In that case, the sheriff had not obtained any lists for the bulk of the reserves located in the district. The sheriff had only sent a single request for such lists. The Court, at para. 20, explained that these efforts were unacceptable and that the government must exercise "diligence, resourcefulness, ingenuity and perhaps persuasion, extending beyond mailing a single request." The situation in the

present case is quite different, in that Ms. Loohuizen had lists for the vast majority of the reserves in Kenora. The problem was that, as time passed, they were growing out of date.

[304] The government's response, however, was not limited to the attempt to obtain better lists. To compensate for the inaccuracy of the current lists, the government, at the direction of Justice Stach, substantially increased the number of questionnaires sent to on-reserve residents over and above what their over-18 population figures required. As noted earlier, the number of questionnaires that would have been sent based on the 1996 census data was 334; and, using Ms. Loohuizen's figures, it was 403. As a result of Justice Stach's direction, the number of jury notices sent to on-reserve residents was increased to 600. In my view, this constituted a reasonable effort to provide on-reserve residents with the opportunity to bring their distinctive perspective to the jury process. In so finding, I am not suggesting that we can know for a fact that the increase in the number of jury questionnaires sent to on-reserve residents compensated with mathematical precision for the inaccuracies in the lists being used. The increase may have been too large or too small. However, given the way the matter developed, these efforts by the government were reasonable for the purposes of the 2008 jury roll.

(3) The "Delivery" Problem

[305] Before turning to the issue of declining response rates, I wish to address a point discussed by my colleague Goudge J.A. He asserts that the increase in the number of questionnaires addressed to on-reserve residents being returned as undeliverable was an independent problem faced by the government – separate and apart from the lists issue – to which the government failed to react until 2011. In my view, this concern is not well founded. The rising number of undeliverable questionnaires is directly related to the deteriorating quality of the lists. As the lists grew older, they would include a greater number of persons who had either died or moved off of the reserve. In addition, new lists obtained by Ms. Loohuizen from the reserves were often voters' lists and, pursuant to the *Corbiere* decision, included the names of some off-reserve band members. Because the questionnaires are usually sent general delivery to the various reserves, these intended recipients would obviously not pick up their mail at the post office within the 30-day period for doing so. As a result, with each year that passed, an increasing number of questionnaires were returned as undeliverable. This is another reason why Justice Stach directed that the number of questionnaires sent to on-reserve residents be increased to 600. In my view, the problem of undeliverable questionnaires is encompassed in the list quality problem and was addressed appropriately by the government.

(4) The Response Rate Problem

[306] In reaching the conclusion that the government did not deploy reasonable efforts as required by the *Charter*, both of my colleagues rely on the fact that while the government knew return rates were deteriorating, little was done to encourage on-reserve residents to respond to jury notices, and Ms. Loohuizen was left to address the problem with no involvement of senior MAG staff. I respectfully disagree. The government was responding adequately to the problem as it was then understood. Starting in 2007, it would have become increasingly apparent that the problem was, and is, complex. In order to bring about an effective solution, time, study and consultation are needed. Furthermore, any solution will likely involve costs, as well as policy and legislative changes whose ramifications must be carefully considered. Below I will discuss what was known, what was done and, finally, what is required to address the issue as it is now understood.

(a) What Was Known at the Time

[307] This court has had the benefit of a massive amount of fresh evidence that contains a considerable amount of after-the-fact analysis of the information available in 2007, as well as data generated subsequently. I am reminded of a quote attributed to Galileo: “All truths are easy to understand once they are discovered; the point is to discover them.”

[308] Although the PJC would, as noted by my colleagues, have had the raw data from which to calculate the response rates to jury questionnaires by on-reserve residents, nothing in the record before us suggests that prior to January 2007, the PJC had interpreted the data by carrying out the necessary compilation and calculations. January 2007 was the first time that the actual response rate was quantified, and the severity of the problem was known and communicated to Ms. Loohuizen.

[309] This is not to say that the PJC and Ms. Loohuizen were not aware that response rates from on-reserve residents were lower than the rates for off-reserve residents. The fact that on-reserve residents were less likely to respond to jury notices was known in the 1990s.

[310] Even when the hard data about on-reserve response rates became available in 2007, however, it was still thought that this low rate was principally due to the fact that since 2000, the government had been unable to obtain accurate and up-to-date lists of on-reserve residents. This belief endured after 2007, as appears from this court's decision in *Pierre v. McRae, Coroner,* 2011 ONCA 187, 104 O.R. (3d) 321. The court concluded, at para. 68, that the underrepresentation of Aboriginal individuals living on reserves on the Kenora jury roll was due to the INAC lists not being available and the fact that "court officials did very little to obtain other records".

[311] The appellant's principal concern in this case was the deteriorating quality of the lists and this issue was viewed by the parties as the cause of the low response rate. The appellant only addresses the response rate, in the sense of it constituting a separate problem, at para. 76 of his factum. There he explains that because no one was responsible for reviewing and comparing response rates, "no one was in a position to identify the extent of the ongoing problem, let alone assess whether additional efforts ought to be made or changes implemented." Although the appellant's factum also contains some brief discussion of the RPO rates, the submissions and the fresh evidence filed in this matter dealt almost exclusively with the lists and on the efforts made by the government to obtain better, updated lists.

[312] With the benefit of hindsight only, it becomes clear that the problem of declining response rates exists quite independently from the inadequacy of the lists being used. I turn now to address the issue of what was done in response to that problem, as it was understood at the time.

(b) What Was Done

[313] When Ms. Loohuizen was told the actual response rate in 2007, she advised Justice Stach and together they determined that the best way to respond was to increase the number of questionnaires sent to on-reserve residents.

Given what they knew and the time they had to act, this action was appropriate and meets the reasonable efforts standard.

[314] My colleague Goudge J.A. finds fault with this initiative, remarking that it is striking how unsuccessful it was. He points to the number of responses received from on-reserve residents over the 2002 to 2008 period to support his conclusion. In his view, set out at para. 263 of his reasons, the persistent and large difference between the return rates from on- and off-reserve residents "meant a significantly reduced opportunity for inclusion of Aboriginal on-reserve residents in the jury roll relative to off-reserve residents."

[315] I disagree with his conclusions for two reasons.

[316] Firstly, the issue is whether the government's efforts were reasonable in light of the information they had. In my view, the government's action of increasing the number of questionnaires sent to on-reserve residents had a significant impact and, in the circumstances, was reasonable. In point of fact, the numbers set out at para. 269 of Goudge J.A.'s reasons show that this effort did result in more responses being received by the PJC. The number of responses received increased from 44 in 2006 to 60 in 2008, which is greater than the 57 responses received in 2002 when the list problems began.[27] The government's

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[27] It is important to note that despite this rise in responses, the number of questionnaires returned by on-reserve residents in 2008 would have to have been higher still if it was to have kept pace with the

efforts were not made with a view to solving the underlying issue, they were made to offset its effect pending a better understanding of the problem and the implementation of appropriate remedial steps.

[317] Secondly, and more importantly, I disagree with Goudge J.A.'s description of the constitutional obligation imposed on the government, as stated at para. 263 of his reasons and as I have quoted above. The government has to offer all groups with a distinct perspective a reasonable opportunity to have their views included on the jury roll. The fact that a particular group responds in lower numbers to the invitation to participate, and this despite the offer and encouragement of the government, does not mean that they have "a significantly reduced *opportunity* for inclusion" (emphasis added). In other words, a low response rate does not necessarily mean the government has failed to perform its constitutional obligations. As observed in the Iacobucci Report, the reasons for which on-reserve residents choose not to participate in the jury process are complex. No doubt there are many other groups that, for their own reasons, also respond in lower numbers to that offered opportunity. The reasonable efforts of the government must be viewed in the context of their efforts to offer all Ontario residents the opportunity to participate in the jury process and to encourage them to respond favourably. Before concluding that the government's efforts are

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increase in the number of questionnaires sent to off-reserve residents that was necessary to accommodate the number of juries needed in the district that year.

constitutionally deficient with respect to a particular group, however, it must be shown that the government was or should have been aware of the reduced response rates, there were reasonable efforts available to it to encourage an increase in responses from this group, these efforts would have had a realistic prospect of success, and these efforts were not undertaken. What will be considered as reasonable efforts involves a consideration of factors such as costs, policy implications, and the broader impact on the functioning and constitutionality of the provincial jury system. The record before us does not, in my view, support finding that the government's efforts fell short in that regard.

[318] Moreover, Ms. Loohuizen implemented several other initiatives intended to increase on-reserve residents' participation in the jury process, beyond increasing the number of jury notices. Ms. Loohuizen recognized that on-reserve residents faced significant challenges to participating in the jury system that are not necessarily faced by other Ontario communities. Some of her initiatives to address these challenges are set out in paras. 190 to 193 of LaForme J.A.'s reasons, initiatives such as providing a toll-free number on juror summonses, calling juries on Tuesdays rather than Mondays to accommodate travel from remote communities, and assisting in making travel arrangements. I consider that steps like these would, in a small way, serve to convey to those receiving jury notices that the court valued their participation and was sensitive to their needs.

This, it was hoped, would translate into increased willingness to participate in the jury process by on-reserve residents.

[319] My colleagues argue, however, that the government's actions were unreasonable because Ms. Loohuizen was left to address the problem without the assistance and support of senior MAG personnel. This failure to involve senior management is an important component in their assessment that reasonable efforts were not deployed as required by the *Charter*.

[320] Their criticism misses the mark, in my view. The local court office would have the benefit of local knowledge and be able to develop a working relationship with the various First Nations in the district. Further, the fact that Ms. Loohuizen was the person principally responsible for working with the Kenora First Nations was consistent with s. 6(8) of the *Juries Act*, which appoints the local sheriff as responsible for this task:

> In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available.

The Act is not challenged in this proceeding. Leaving Ms. Loohuizen with the primary responsibility for this issue was also in accordance with MAG policy, a policy that applies to all districts in the province.

[321] In addition, the record shows that Ms. Loohuizen was not operating alone. She was working under the direction of both the local judge and Ms. Peacock, her supervisor. She consulted with them and a local elder, and she spoke to several chiefs in the district as she sought solutions to the problem.

[322] When Ms. Loohuizen was informed of the actual rates of response in 2007, she would have realized that the problem was more serious than she had previously understood and may be beyond the scope of her powers to resolve. As mentioned above, she reported the problem to the Assistant Deputy Minister in 2007. As noted by Ms. Peacock's comment that "it's gone up to Corporate…. We've made noise and it's in their hands", by August 2008, higher echelons in MAG were seized of the matter and were considering the need for policy and legislative changes. Ms. Loohuizen also started working with the Ontario Justice Education Network and MAG's policy division in order to devise ways to educate on-reserve residents about the jury system and to improve response rates.

[323] In any event, even if senior management had become involved earlier than it was and some improvement in the situation was thereby achieved, it would only have obviated the need for such a large increase in the number of questionnaires sent to on-reserve residents.

[324] As a result, when viewed in context, I consider the government's efforts to address the problem of the low response rates to be reasonable.

[325] One last issue I wish to address briefly is my colleagues' argument that Ms. Loohuizen and the PJC ought to have prepared all of the reports and evaluations required by PDB #563. They argue that had the respondent and its agents done so, it would have known about the low response rates earlier, and could have taken steps to remedy the situation before 2008.

[326] It is certainly regrettable that the reporting required by the policy was not consistently made. Better reporting would potentially have allowed Ms. Loohuizen to know the extent of the low return rates sooner. It is not clear, however, to what extent these reports would have assisted in shedding more light on the cause of the low response rates and alerted MAG to the fact that the problem was largely independent of the deteriorating quality of the lists being used. Furthermore, I do not view that a failure to submit some of the reports provides a basis for concluding that the respondent breached its duty to make reasonable efforts and that the juries constituted during those years were not *Charter*-compliant.

(c) What Is Required

[327] Even with the benefit of hindsight, my colleagues offer only a few directions as to what the respondent ought to have done to address the challenge posed by the declining response rates. Moreover, these suggestions are principally directed at improving the quality of the lists: for example, one

central proposal is that senior MAG personnel ought to have been involved earlier in the negotiations with band leadership to obtain lists.

[328] It must be recalled, however, that Ms. Loohuizen and Justice Stach were aware of the problems with the lists. By increasing the number of questionnaires sent, they took appropriate and reasonable steps in the circumstances to compensate for their deteriorating quality and the unavailability of new, replacement lists. To the extent that my colleagues' suggestions would have produced better lists, this would simply have eliminated the need to increase the number of questionnaires as done by Ms. Loohuizen and Justice Stach.[28] Implementing their suggestions would not, by and large, have resolved the problem of declining return rates.

[329] That problem is highly complex and will require very different solutions that will take time to implement. As the Iacobucci Report found, the low return rates and consequent underrepresentation of on-reserve residents on the jury roll are symptoms of a much broader problem. As Mr. Iacobucci explained, at 2:

> An examination of that problem [the underrepresentation of individuals living on reserves on Ontario's jury roll] leads inexorably to a set of broader and systemic issues that are at the heart of the current

[28] Experience has shown that obtaining updated lists from the reserves actually produces worse results than using the INAC lists, however. The analysis carried out by the respondent regarding the 2011 Kenora jury roll suggests as much. For the 2011 jury roll, the government used 24 INAC lists and 18 more recent lists received from the chiefs of reserves. These 18 lists were dated between 2006 and 2010. Of the 313 questionnaires sent to persons on the INAC lists, 39 (or 12.5%) were filled out and returned. Of the 371 questionnaires sent to persons on the more recent lists, 26 (or 7.0%) were filled out and returned.

> dysfunctional relationship between Ontario's justice system and Aboriginal peoples in this province. It is these broad problems that must be tackled if we are to make any significant progress in dealing with the underrepresentation of First Nations individuals on juries.

[330] Resolving the low response rate problem which, in turn, causes the underrepresentation problem, will therefore likely require a review of both policy and legislation. When the PJC calculated the on-reserve response rates in 2007, MAG would have realized that the problem of low response rates had worsened significantly. By then it would have also realized that more accurate lists might not be forthcoming. MAG then began the process of considering the need for changes to its policies and to the legal framework for assembling jury rolls. The October 23, 2007 briefing note prepared by Ms. Peacock, the Supervisor of Court Operations for Kenora, is an indication that this policy development process was being undertaken.

[331] But when a government is faced with a problem of this complexity, and it must contemplate policy changes and legislative reform, as well as the expenditure of scarce resources, it should not have to act precipitously. In my view, the government cannot be faulted for taking the time necessary to fully understand the root causes of the problem; consider options available to it to bring about a resolution; undertake the studies it needs to be reasonably confident that the proposed changes will actually help; and inquire into and weigh

the broader ramifications of any changes being considered. Once this process is complete, the government should act. As set out by Deschamps J. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, the courts must show deference to the government when they are called upon to change policy or legislation because of the emergence of new social, economic or political conditions. As Deschamps J. explains, at para. 95, deference is often accorded to the government in recognition of "the facts that it is up to the government to choose the measure, that the decision is often complex and difficult, and that the government must have the necessary time and resources to respond".

[332] Such caution by the government is particularly warranted in this case because the policy and legislation in question applies to the preparation of jury rolls in every district in Ontario. Changes must be approached thoughtfully, as there can be important broader implications. Particularly, before deciding to target a specific group for greater participation in the jury process, care must be taken to ensure that the constitutionally-required randomness of the jury roll is maintained. The policy now in place encourages individuals to respond to questionnaires by making it a legal requirement. This policy applies equally to every Ontarian, whether that Ontarian is a member of an underrepresented group, a group reluctant to participate in the jury system, or a group eager to participate. This case has highlighted the underrepresentation of a particular group, Aboriginal people residing on reserves. Because of the structure of the

Juries Act, that group's response rate can be calculated. The response rates of other disadvantaged groups cannot be so easily calculated, as they are grouped with all off-reserve residents on the MPAC list. Representativeness of the jury roll requires that all distinct perspectives have a fair opportunity to participate in the process. A decision to target one particular group to encourage their participation should not be done hastily without having considered its potential ramifications.

[333] Commissioning a review such as the one conducted by Mr. Iacobucci is an appropriate response to a polycentric problem like that faced here by the government. The Iacobucci Report was an important step in the study of the problem and outlined several possible approaches to solving it. Which of the Report's many proposals, if any, come within the government's obligation to make "reasonable efforts" is not for this court to decide. Some, however, clearly go beyond what is constitutionally mandated and fall squarely within the realm of government policy.

[334] The failings raised by the appellant do not rise to the level of a constitutional breach, given the current structure of the *Juries Act*; the state of knowledge in 2007; and the steps taken by the government to secure better lists, ensure the delivery of jury questionnaires, and encourage their return. The obligation of the government is to make reasonable efforts, not all efforts and not fruitless efforts. As I have explained, the government should also be given the appropriate time to study the problem, develop a proposed solution, and bring

about its implementation. The complexity of the problem in this case meant that the government's efforts were reasonable in all of the circumstances, and therefore in compliance with its *Charter* obligations.

D. SECTION 629 OF THE *CRIMINAL CODE*

[335] The appellant also argues that the conduct of the government in preparing the jury roll constitutes partiality, fraud or wilful misconduct under s. 629(1) of the *Criminal Code, R.S.C. 1985, c. C-46*. I would not give effect to this submission. Although the government made errors and oversights in the preparation of the jury roll, the record demonstrates the good faith and sustained efforts of the various persons involved and their concern to ensure on-reserve residents be provided a fair opportunity to participate in the jury process.

E. CONCLUSION

[336] For these reasons, I would dismiss the appeal.

Released: June 14, 2013 ("S.T.G.")

"Paul Rouleau J.A."